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No. _____

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IN THE

Supreme Court of the United States

MACKENTOCH SAINTHA,

Petitioner,

—v.—

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1252(a)(2)(D) of Title 8 gives the courts of appeals jurisdiction to review immigration removal orders where aliens raise "constitutional claims" or "questions of law." The Fourth Circuit in this case dismissed petitioner's torture claims for lack of jurisdiction on the ground that they raised only factual questions. The court did so notwithstanding that petitioner did not challenge the underlying descriptive facts of his case, but rather the *application* of the governing legal standards to those facts. The Fourth Circuit's decision adds to the already considerable division in the courts of appeals regarding the meaning of the term "questions of law" in Section 1252(a)(2)(D). In particular, the courts of appeals are deeply divided over whether "questions of law" encompasses not only "pure" legal questions but also the application of law to fact, and if so, how to properly distinguish between unreviewable factual claims and those involving the application of law to fact. The questions presented are:

1. Whether, in light of 8 U.S.C. 1252(a)(2)(D), the Fourth Circuit erred in dismissing petitioner's claims, where petitioner did not challenge the underlying facts found by the immigration judge and instead challenged only the *application* of the governing legal standards to those facts.

2. Whether, consistent with the Suspension Clause and this Court's decisions in *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), Congress may repeal all judicial review by any means over a claim involving the application of law to fact.

PARTIES TO THE PROCEEDING

Petitioner is Mackentoch Saintha. Petitioner was also petitioner in the court of appeals, but was respondent in the Immigration Court and Board of Immigration Appeals.

Respondent, who was also the respondent in the court of appeals, is Michael B. Mukasey, Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mackentoch Saintha respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 516 F.3d 243. There were no district court proceedings. The decision and order of the immigration judge (App. 40a), and the decision of the Board of Immigration Appeals (App. 26a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2008. App. 1a. Rehearing *en banc* was denied on April 14, 2008. App. 54a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 51a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, 9, Cl. 2; 8 U.S.C. 1252(a)(2)(C), 1252(a)(2)(D); and 8 C.F.R. 208.18(a)(1), 208.18(a)(7).

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[1] "App." refers to the appendix attached to this petition.

STATEMENT

Petitioner alleges that he may not be deported to Haiti because he will be tortured by his family's political enemies and the Haitian government will acquiesce in that torture. The immigration judge ("IJ") agreed, but the Board of Immigration Appeals ("Board" or "BIA") reversed, concluding that although petitioner would likely be tortured, he had not satisfied the regulatory "acquiescence" requirement. The Fourth Circuit declined to review the Board's acquiescence ruling and dismissed for lack of jurisdiction, holding that petitioner had not raised a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D).

A. Statutory Background.

1. On April 18, 1988, the United States signed the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Under CAT Article 3, States Parties to the Convention cannot "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

To implement CAT, Congress passed The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). Section 2242(b) of FARRA gave the Attorney General authority to promulgate implementing regulations relating to CAT Article 3.

Under the regulations, aliens have the burden to establish that it is "more likely than not" they will be tortured if removed to a particular country. 8 C.F.R. 208.16(c)(2). The regulations define "torture" as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or *acquiescence* of a public official or other person acting in an official capacity.

8 C.F.R. 208.18(a)(1) (emphasis added). The regulations further define the term acquiescence: a public official "acquiesces" to torture when, "prior to the activity constituting torture," the official is aware of "such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. 208.18(a)(7).

The BIA has interpreted the "acquiescence" regulation to require that officials "willfully accept" the act of torture. *See Matter of S-V-*, 22 I&N Dec. 1306, 1312 (BIA 2000). The courts of appeals,

however, have overwhelmingly rejected that interpretation and have adopted a "willful blindness" standard. *See, e.g.*, *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240-41 (4th Cir. 2004). Because this case arose in Virginia, the BIA was bound by Fourth Circuit precedent and thus purported to apply the "willful blindness" standard.

Finally, and importantly, CAT is a mandatory form of relief. There is no discretion to deny relief where the alien satisfies the legal requirements for CAT relief. 8 C.F.R. 208.16(c)(4); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 212 (3d Cir. 2003).

2. Under the general judicial review procedures of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1252 *et seq.*, applicants seeking protection from torture under CAT and FARRA may file a "petition for review" of their removal orders in the court of appeals. *See* 8 U.S.C. 1252(a)(1); *see also* 8 U.S.C. 1252(a)(4) (specifically providing for petition-for-review jurisdiction over CAT claims). However, if (as in this case) the applicant is removable on the basis of a criminal offense listed in 8 U.S.C. 1252(a)(2)(C), judicial review is barred, except insofar as the applicant is raising "constitutional claims" or "questions of law" pursuant to Section 1252(a)(2)(D). That limitation on review is the result of 1996 and 2005 amendments to the INA.

a. In 1996, Congress passed a series of jurisdictional provisions, including the limitation on review for aliens with certain types of criminal convictions. *See* 8 U.S.C. 1252(a)(2)(C). In 2001, in

INS v. St. Cyr, 533 U.S. 289 (2001), this Court addressed the provision barring review for aliens removable on the basis of criminal offenses and reached four principal conclusions relevant here.

First, the Court concluded that the 1996 jurisdictional restrictions generally barred direct review in the courts of appeals by petition for review of claims regarding eligibility for discretionary relief. *St. Cyr*, 533 U.S. at 311-12; *see also Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (companion case to *St. Cyr*). *Second*, the Court concluded that the preclusion of all review by any means over the alien's claim would trigger "substantial constitutional questions" under the Suspension Clause. *St. Cyr*, 533 U.S. at 300. *Third*, the Court held that the 1996 provision did not bar the alien's right to district court habeas corpus review under 28 U.S.C. 2241, relying heavily on the canon of constitutional avoidance and the longstanding rule that habeas review may only be repealed by an explicit directive in the statute's text. *Id.* at 299, 312-13. *Finally*, the Court made clear that the Suspension Clause protected the substance of review, and not the form of review. Congress was thus permitted to provide a substitute for habeas corpus under 28 U.S.C. 2241 *provided* that it is "neither inadequate nor ineffective." *Id.* at 314 n.38. In particular, the Court stated that Congress could once again make the courts of appeals the primary forum for review as long as the petition for review procedure in the court of appeals afforded review

commensurate with that afforded in habeas. *See id.*; *see also id.* at 305.

Thus, in light of the 1996 jurisdictional restrictions and this Court's decision in *St. Cyr*, aliens removable on the basis of criminal convictions listed in 8 U.S.C. 1252(a)(2)(C) were precluded from raising CAT claims in the courts of appeals by petition for review, but could raise those claims in a district court habeas action under 28 U.S.C. 2241. *See, e.g., Wang v. Ashcroft*, 320 F.3d 130, 142 (2d Cir. 2003).

Importantly, in these habeas CAT cases, courts concluded that the *scope* of review included both constitutional and non-constitutional legal claims, including the application of law to fact. *See, e.g., id.* (relying on *St. Cyr* and finding habeas review over CAT claim, explaining that petitioner "does not merely contest the immigration court's factual determinations – he challenges its application of the facts to FARRA and the regulations adopted pursuant to FARRA"); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003) (finding habeas review of CAT claim, where petitioner "does not dispute the factual findings of the IJ" but "argues that the IJ wrongly applied the standard for relief set forth in FARRA and its implementing regulations to the facts of his case"); *Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (holding that habeas jurisdiction was available over Singh's CAT claim "even if that claim does not raise a purely legal question of statutory interpretation") (internal quotation marks omitted).

b. In 2005, Congress enacted the REAL ID Act in response to *St. Cyr*. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310. As noted in the Joint House-Senate Conference Report, the REAL ID Act had dual objectives. H.R. Rep. No. 109-72 (2005). The first was to largely eliminate habeas review over challenges to removal orders and channel such review back to the courts of appeals by petition for review. Doing so, in Congress' view, would eliminate the delays inherent in providing a double layer of review (habeas review followed by an appeal to the circuits). Congress also believed that placing all review of removal orders back into the courts of appeals would eliminate the perceived anomaly created by the 1996 amendments, in which certain aliens sought review directly in the courts of appeals, while other aliens – those subject to a jurisdictional bar in the courts of appeals – obtained review by commencing actions in district court. Accordingly, Congress enacted several provisions that expressly eliminated habeas review over removal orders. *See*, *e.g.*, 8 U.S.C. 1252(a)(4); 1252(a)(5); 1252(b)(9). *See also* H.R. Rep. No. 109-72 at 175.

The second goal of the Real ID Act was to ensure that the *scope* of review of removal orders provided in the courts of appeals encompassed those claims traditionally reviewable in habeas, thus ensuring an adequate substitute for habeas. Indeed, the Conference Report expressly cites to *St. Cyr* and repeatedly acknowledges Congress' understanding that it cannot eliminate habeas review without

providing a commensurate substitute. H.R. Rep. No. 109-72 at 175.

To accomplish this second goal, Congress enacted a generally applicable jurisdictional provision – 8 U.S.C. 1252(a)(2)(D). As previously noted, Section 1252(a)(2)(D) provides the courts of appeals with jurisdiction over "constitutional claims" and "questions of law" and does so *notwithstanding* the existing jurisdictional bars in the INA (with exceptions not relevant here).[2]

Thus, in light of Section 1252(a)(2)(D), there is no dispute that the courts of appeals may review claims by petition for review that previously would have been barred under the 1996 jurisdiction-stripping provisions – including CAT claims raised by aliens with criminal convictions. Rather, the disagreement among the courts of appeals concerns the *scope* of review, and in particular, the types of claims that fall within the term "questions of law" in Section 1252(a)(2)(D).

B. Petitioner's Administrative Proceedings.

1. The petitioner in this case, Mackentoch Saintha, is a 27-year-old native of Haiti. In 1994, at the age of 13, petitioner fled Haiti with his family to escape political violence due to his stepfather's

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[2] Although 8 U.S.C. 1252(a)(4) specifically provides that CAT claims may be reviewed in the courts of appeals, it does not define the *scope* of review. Thus, the courts of appeals must still look to Section 1252(a)(2)(D) for the proper scope of review for CAT claims.

activities as a member of a pro-Aristide political party that opposed the former Jean-Claude "Baby Doc" Duvalier regime. App. 5a n.3; 44a-45a. The United States admitted petitioner as a refugee pursuant to 8 U.S.C. 1157 and, one year later, he adjusted to lawful permanent resident status. App. 29a-30a.

Between 1998-2000, while petitioner was a teenager, he was convicted of several minor offenses (such as petty larceny and trespassing). Seeking to get his son back on track, his stepfather barred him from his parents' home. Petitioner, however, returned to his family's house with an unwelcome friend and his stepfather called the police to "teach him a lesson." J.A. 41-42.[3] Petitioner was charged and subsequently convicted under Virginia law of the robbery and larceny of his parents' home, for which he served approximately five years in prison. App. 4a.

2. In 2006, at the conclusion of petitioner's sentence, the government commenced removal proceedings against him based on the robbery of his parents' home. Petitioner conceded he was removable as an "aggravated felon" under 8 U.S.C. 1227(a)(2)(A)(iii), but requested deferral of removal under the CAT. *See* 8 C.F.R. 208.16(c); 208.18(a). In support of his request for CAT relief, petitioner argued that, as a criminal deportee from the United States, he would automatically be placed in prison

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[3] "J.A." refers to the Joint Appendix in the Fourth Circuit.

upon his return to Haiti and that he would be especially vulnerable to torture inside Haiti's notorious prisons because of his family's well-known political ties. Petitioner further argued that his family's political ties would also place him at substantial risk of being tortured once he was released from prison.

On April 10, 2006, the immigration judge granted CAT relief, concluding that it was more likely than not that petitioner would be tortured in Haiti because of his stepfather's political associations. App. 47a-49a (finding "a probability that the respondent would be tortured upon return to Haiti by his stepfather's political opponents or individuals associated with such political opponents").[4]

Among other things, the IJ noted that when petitioner's stepfather returned briefly to Haiti in 2003, he was forced to go into hiding from his political opponents and ultimately had to flee within ten days of his arrival. The IJ further noted that the family's "political opponents" killed petitioner's 82-year-old grandmother by burning her alive, "apparently because they could not capture" the stepfather himself. App. 45a. The IJ similarly noted that one of petitioner's cousins in Haiti was killed around the same time as petitioner's grandmother

[4] Petitioner has lived with his stepfather since the age of four and, in Haiti, is considered to be part of his stepfather's family, thereby placing him at risk from his stepfather's political opponents. App. 44a; J.A. 221.

and that the family believes that this was also done by their political opponents. App. 45a.[5]

Finally, the IJ held that petitioner satisfied the "acquiescence" requirement for a CAT claim. App. 48a-49a. The IJ's conclusion that petitioner satisfied the legal standard for acquiescence was based, among other things, on the fact that, as "a criminal deportee, the government of Haiti would be well-aware of the respondent's return and most likely of his potential vulnerability as the child of a Haitian refugee residing in the United States." App. 48a. The IJ further found that the "current Haitian government is incredibly corrupt and makes virtually no effort to protect the human rights of its citizens regardless of political background," and, in particular, "the Haitian government makes little or no effort to protect the rights of criminal deportees returned from the United States." App. 48a. The IJ concluded that "[u]nder these circumstances" the Haitian government "would be aware of the potential torture of [petitioner] and would be 'willfully blind' to its occurrence." App. 48a.

3. On November 16, 2006, the BIA reversed. Notably, the BIA agreed with the IJ that petitioner would more likely than not be tortured if returned to Haiti. App. 35a ("[W]e conclude that it is . . . more

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[5] The record before the IJ contains evidence of other gruesome acts of political violence against political allies of the stepfather committed after petitioner's family left Haiti, including a woman who was hacked to death with a machete. *See* JA 40; App. 6a.

likely than not that [petitioner's] stepfather's enemies would seek to torture the [petitioner]."). Like the IJ, the BIA pointed to the brutal killing of petitioner's grandmother and the fact that petitioner's stepfather "was forced to go into hiding within 10 days of his arrival to avoid being attacked on account of his past political activities." App. 34a & n.3 (noting that when petitioner's stepfather "could not be located, his foes targeted [petitioner's] grandmother instead, burning her alive"). The BIA also noted record evidence on Haiti's "continued practice of jailing the government's political opponents," and "the past abuses suffered by [petitioner], as well as his other family members." App. 34a & n.3.

The BIA further agreed that the Haitian government would be aware of petitioner's return to Haiti. App. 35a ("[W]e find that there does exist a clear probability that both the Haitian government and [the stepfather's] enemies would have the ability to learn of the respondent's return."). The BIA found that petitioner's "risk of being identified by his stepfather's political enemies is further heightened due to the fact that the only way he can secure his release from prison is with the assistance of a family member, and the only family member still living in Haiti is one of [petitioner's stepfather's] sisters." App. 34a. *See also* App. 34a (noting record evidence that petitioner "is recognizable" and would require "assistance in settling back into Haitian society"). The BIA nonetheless denied petitioner's CAT claim on the ground that petitioner had failed to satisfy the

requirement that the Haitian government "acquiesce" in his likely torture. App. 36a-37a.

Critically, in reaching that conclusion, the BIA did not take issue with the IJ's underlying factual findings. Indeed, the BIA stated at the outset of its opinion that it found "no clear error in the Immigration Judge's findings of fact" and credited "the testimony of both the [petitioner] and his father." App. 29a n.1. Moreover, the BIA specifically acknowledged that "Haiti is rife with political violence," governmental corruption, and other abuses, but ruled that "these problems do not show that the Haitian government would likely remain willfully blind to the [petitioner's] risk of torture and therefore breach any legal responsibility that it may have to prevent it." App. 37a. *See also* App. 37a-38a ("Based upon the record before us, it seems just as likely that the [petitioner's] family would be able to manipulate the system in order to either expedite his release from prison or insure that he is not tortured.").

C. The Fourth Circuit's Decision.

The court of appeals dismissed petitioner's CAT claim for lack of jurisdiction, without reaching the merits of whether petitioner satisfied the acquiescence requirement under the regulations. According to the court of appeals, petitioner was raising only unreviewable "factual" claims, not

"questions of law" under Section 1252(a)(2)(D). App. 9a-17a.[6]

The Fourth Circuit began by noting that 8 U.S.C. 1252(a)(2)(C) prohibited review of final orders of removal against aliens (like petitioner) with aggravated felony convictions, but acknowledged that the REAL ID Act had restored its jurisdiction over these determinations to review "constitutional claims" and "questions of law" under Section 1252(a)(2)(D). App. 10a. The Fourth Circuit further noted that the courts of appeals were divided on whether the term "questions of law" was limited to pure legal claims or also encompassed claims involving the application of law to fact. App. 12a n.4. But the court concluded that, in this case, it need not resolve that question because it viewed petitioner's claims as purely factual. *See* App. 13a-15a. *But see id.* (failing to note the Fourth Circuit's prior decision in *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006), holding that claims involving the "application of law to fact" are reviewable under Section 1252(a)(2)(D)). The court thus concluded that even if "questions of law" encompassed the application of law to fact, petitioner's challenge to the BIA's

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[6] Petitioner also argued that he was improperly denied adjustment of status and a Section 209(c) (8 U.S.C. 1159(c)) waiver of inadmissibility. The Fourth Circuit rejected that claim on the merits and petitioner is not pursuing it in this Court.

acquiescence ruling fell outside the scope of Section 1252(a)(2)(D). App. 14a-15a.

In reaching that conclusion, the court of appeals adopted a novel bright-line jurisdictional test. According to the Fourth Circuit, "the appropriate analytical framework" consisted of first deciding which standard of review it would use if the court had jurisdiction, and if the "substantial evidence" test were the proper standard of review, then the claim would be deemed unreviewable because the substantial evidence standard is reserved for factual claims. App. 13a-15a. Based on that analysis, the court concluded that petitioner raised only a factual claim: "Because we review determinations regarding governmental acquiescence for substantial evidence, and because we only apply that standard to factual determinations, the BIA's CAT determination here is properly characterized as factual, not legal, in nature." App. 14a-15a.

Finally, the court of appeals cited to the REAL ID Act's legislative history in support of its analytical approach. In particular, the court noted that the Joint House-Senate Conference Report stated that unreviewable factual claims under Section 1252(a)(2)(D) "include those questions that courts would review under the substantial evidence" standard. App. 13a (internal punctuation omitted).

On April 14, 2008, the Fourth Circuit denied rehearing *en banc*. App. 54a. This petition followed.

REASONS FOR GRANTING THE WRIT

Review is warranted because the courts of appeals are sharply divided over the scope of the term "questions of law" in 8 U.S.C. 1252(a)(2)(D). Moreover, the circuit split has broad practical significance because Section 1252(a)(2)(D) is at issue in hundreds of immigration cases each year, in a variety of contexts, including in CAT cases where the issues are of life and death importance. Indeed, since the enactment of the REAL ID Act, a Westlaw search indicates that the courts of appeals have issued approximately 1000 decisions citing to 8 U.S.C. 1252(a)(2)(D). Nor is it likely that the disagreement among the courts of appeals will resolve itself through further litigation given how intractable the division has proven. Finally, the Fourth Circuit's decision is wrong.

I. THIS CASE INVOLVES AN ENTRENCHED CIRCUIT SPLIT ON A JURISDICTIONAL ISSUE OF FAR-REACHING IMPORTANCE.

Petitioner in this case did not challenge the underlying facts found by the IJ (and accepted by the BIA), but rather whether those facts satisfied the governing legal standards. This Court has frequently referred to such a claim as one involving the "application" of law to fact. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

The Court has stated that a pure fact – variously referred to as an "historical," "descriptive"

or "primary" fact – involves an inquiry into questions that can be determined without reference to the legal standards at issue. As the Court phrased it in *Thompson*, the underlying primary facts involve the "what happened" of a particular issue. 516 U.S. at 112. *See also Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (stating that "[b]y 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators'") (internal citations omitted), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

In contrast, the Court has stated that a claim involving the application of law to fact is one where "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). *See also Scott v. Harris*, 127 S. Ct. 1769, 1776 n.8 (2007).

As the Court has further explained, it is only by reviewing the application of law to concrete factual settings that legal rules can ordinarily take shape. *See Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (explaining that "the legal rules for probable cause and reasonable suspicion acquire content only through application" and that "[i]ndependent review is . . . necessary if appellate

courts are to maintain control of, and to clarify, the legal principles").

Notwithstanding this analytical framework, the courts of appeals have struggled in the immigration context to define whether particular claims are factual or legal for purposes of exercising jurisdiction under Section 1252(a)(2)(D). *Cf. Thompson*, 516 U.S. at 110-11 (noting that the line between law and fact is "sometimes slippery"); *Pullman-Standard*, 456 U.S. at 288 (characterizing the distinction between fact and law as "vexing").

A. The Courts Of Appeals Are Divided Over The Scope of Section 1252(a)(2)(D).

1. The courts of appeals have fallen into three basic categories. The *first* category is comprised of the Sixth, Seventh and Tenth Circuits. Each of those circuits has understood the term "questions of law" narrowly to encompass only what they perceive as "pure" questions of law. Accordingly, they have routinely dismissed claims that other circuits have reviewed. *See Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (limiting review under Section 1252(a)(2)(D) to "constitutional claims or matters of statutory construction"); *Shkulaku-Purballori v. Mukasey*, 514 F.3d 499 (6th Cir. 2007) (same); *Jimenez Viracacha* v. *Mukasey*, 518 F.3d 511 (7th Cir. 2008), *pet. for certiorari filed*, No. 07-1363 (April 28, 2008) (holding that Section 1252(a)(2)(D) does not encompass claims involving the "application of law to fact"); *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir.

2006), *reh'g en banc denied* (same); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review 'a narrow category of issues regarding statutory construction'") (citation omitted); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th Cir. 2007) (same).

The *second* category consists of two circuits (the First and Fifth) that have likewise severely limited the scope of "questions of law." But, unlike the Sixth, Seventh and Tenth Circuits, they have done so without categorically limiting "questions of law" to so-called "pure" questions of law. Instead, they have routinely found jurisdiction lacking on the ground that the particular claim in the case is, in their view, more factual than legal, and thus, outside the scope of Section 1252(a)(2)(D). *See, e.g.*, *Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Hana v. Gonzales*, 503 F.3d 39, 42-43 (1st Cir. 2007); *cf. Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005).

The *third* category consists of five circuits (the Second, Third, Eighth, Ninth and Eleventh) which have explicitly held that "questions of law" in Section 1252(a)(2)(D) covers both "pure" questions of law as well as the "application of law to fact." These courts have further held that the "application of law to fact" should be understood to preclude review only of the type of claim denominated by this Court as a "primary," "descriptive" or "historical" fact. *Thompson*, 516 U.S. at 112.

Thus, these circuits have consistently reviewed claims that other circuits have deemed to fall outside the scope of Section 1252(a)(2)(D). *See, e.g.*, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006) (rejecting view that Section 1252(a)(2)(D) is limited to "pure" claims); *Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (concluding that under Section 1252(a)(2)(D) "we have jurisdiction to review the BIA's application of law to the facts of this case"); *Nguyen v. Mukasey*, 522 F.3d 853, 855 (8th Cir. 2008) (per curiam) (concluding that "whether the IJ properly applied the law to the facts" is a reviewable "legal question"); *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007) (finding jurisdiction to review claims involving the "application of law to fact" and rejecting view that Section 1252(a)(2)(D) is limited to "pure" questions of law); *Jean-Pierre v. U.S. Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007) (concluding that it could review "the application of an undisputed fact pattern to a legal standard" under Section 1252(a)(2)(D)).

The Fourth Circuit's ruling deepens this already entrenched division. Like the First and Fifth Circuits, the Fourth Circuit appears hesitant to pronounce categorically whether "questions of law" should be understood to cover only "pure" legal claims (as opposed to questions involving the "application of law to fact"). *Compare* App. 12a n.4 (decision in this case declining to make a categorical statement), *with Jean v. Gonzales*, 435 F.3d 475, 482

(4th Cir. 2006) (holding that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act). But, whatever the label used to characterize the type of claim, the Fourth Circuit's ruling adds to the confusion over the types of claims that may be reviewed in cases where the alien does not purport to challenge the underlying primary facts. Thus, although the Fourth Circuit has not specifically adopted all of the reasoning of circuits like the Sixth, Seventh, and Tenth (*i.e.*, that Section 1252(a)(2)(D) is limited to legal claims perceived as "pure"), it has reached the same erroneous jurisdictional outcome.

2. This disagreement over the meaning of Section 1252(a)(2)(D) has significant practical consequences. Section 1252(a)(2)(D) affects countless areas of immigration, including eligibility for humanitarian waivers, asylum, and CAT. The division among the courts of appeals has thus had a substantial impact on immigration law since the enactment of the REAL ID Act in 2005.

In the CAT context, for example, some courts of appeals, like the Fourth Circuit in this case, have refused to review claims on the ground that they are perceived as too "factual," without examining the precise type of claim presented by the alien. The Seventh Circuit, for instance, has held broadly that whether an alien has satisfied the CAT "more likely than not" legal standard "does not depend upon any constitutional issue or question of law." *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005).

In contrast, other circuits have more closely examined the precise type of claim advanced by the petitioner and have reviewed CAT claims where the alien has not challenged the underlying primary facts. In *Pierre v. Gonzales*, 502 F.3d 109, 121 (2d Cir. 2007), for example, the Second Circuit explained that factual findings involve such issues as "the prevailing conditions in Haiti" and whether the alien will have "access to medicine." The Second Circuit made clear that it could not review such determinations, but that it does "review, *de novo*, the agency's application of the definition of torture to its factual findings about what is likely to happen." *Id.* *See also Wang*, 320 F.3d at 142-43 (pre-REAL ID Act case) (noting "alien does not merely contest the immigration court's factual determinations – he challenges its application of the facts to FARRA and the regulations adopted pursuant to FARRA.").

Similarly, in *Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006), in exercising jurisdiction, the Third Circuit stated that the "question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than not that [the alien] will be subject to persecution or torture upon removal to Haiti." *Id.* (concluding that the court had "jurisdiction to review the BIA's application of law to the facts of this case"). *See DeAlmeida v. Attorney General*, 240 Fed. Appx. 963, 965 (3d Cir. 2007) (unpublished) (reviewing and affirming the BIA's conclusion that "undisputed facts in the record did not satisfy the standard for CAT

relief" because petitioner had failed to establish a likelihood that he would be imprisoned or tortured); *Badewa v. Attorney General*, 252 Fed. Appx. 473, 478 (3d Cir. 2007) (unpublished) (reviewing whether the BIA erred in finding that the alien "failed to demonstrate that it is more likely than not that the Nigerian government will detain and torture him if he returns").

The Ninth and Eleventh Circuits have likewise carefully distinguished between the underlying historical facts and the application of the governing legal standards to those facts, and have accordingly reviewed "application" questions in the CAT context. *See, e.g., Arteaga v. Mukasey*, 511 F.3d 940, 949 (9th Cir. 2007) (exercising jurisdiction over alien's CAT claim, concluding that "the evidence in the record does not compel a contrary result" where "the IJ and the BIA agreed that Arteaga did not meet his burden of showing that more likely than not he would be tortured at the hands of the El Salvadoran government if removed"); *Singh*, 351 F.3d at 442 (pre-REAL ID Act case) (finding jurisdiction where alien "challenged the BIA's application of the Convention and FARRA to the facts of his case"); *Jean-Pierre v. Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007) ("The necessary conclusion we draw from our precedent and from the language found in the REAL ID Act is that we have jurisdiction to review Jean-Pierre's claim in so far as he challenges the application of an undisputed fact pattern to a legal standard.").

In the asylum context, the courts of appeals have also sharply disagreed over their jurisdiction. In particular, the circuits are squarely in conflict over their jurisdiction to review whether aliens have satisfied one of the statutory exceptions for late-filed asylum applications. In the Ninth Circuit, such claims can be reviewed under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 657 ("[T]he factual basis of Ramadan's petition is undisputed; we only review whether the IJ appropriately determined that the facts did not constitute 'changed circumstances' as defined by immigration law."). *See also Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008).

In other circuits, however, the courts of appeals routinely deny jurisdiction on the ground that the claim is too factual in nature or not a pure legal claim. In *Jimenez*, 518 F.3d 511, for example, the Seventh Circuit expressly disagreed with the Ninth Circuit's decision in *Ramadan* and held that Section 1252(a)(2)(D) encompasses only "pure" questions of law and, on that basis, dismissed the alien's claim that he had satisfied one of the statutory exceptions for late-filed asylum applications. The court stressed that it may not review the "application of law to fact," *i.e.*, whether the alien's facts satisfy the governing legal standards.

In *Nakimbugwe v. Gonzales*, 475 F.3d 281, 284 n.1 (5th Cir. 2007), the Fifth Circuit likewise refused to review whether the alien had satisfied a statutory exception for late-filed asylum applications,

reasoning that "many determinations of timeliness are based on an IJ's assessment of facts and circumstances that affected the applicant's filing, and even after the passage of the Real ID Act, such rulings are clearly unreviewable by this Court." *Id.* (declining to review alien's claim that extraordinary circumstances excused late filing); *see also Zhu v. Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (following *Nakimbugw*). *See also Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007).

The Fifth Circuit (like other circuits) has thus declined to review claims when it perceives the question to be heavily fact-dependent, regardless of whether the underlying descriptive facts are in dispute. *See Nakimbugwe*, 475 F.3d at 596 n.31 (declining to review claim because it was too dependent on an "assessment of facts and circumstances"). Yet, as this Court has explained, questions involving the application of law to fact are necessarily fact-bound, and thus, will always involve an *assessment* of facts and circumstances. *See, e.g., Ornelas,* 517 U.S. at 697. Indeed, if such questions were not tied to the facts of the case, they would present something more akin to pure questions of law. But, as the Second, Third, Eighth, Ninth, and Eleventh Circuits have held, Section 1252(a)(2)(D) is not limited to claims perceived as presenting "pure" legal questions.

The First and Fourth Circuits have followed the Fifth Circuit and have likewise refused to review "application" claims in asylum cases where those

claims were perceived as too factual. *See Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007) (finding, without explanation, no review of asylum filing exceptions); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005) (stating that the "BIA findings as to timeliness and changed circumstances are usually factual determinations"); *Hana v. Gonzales*, 503 F.3d 39, 42-43 (1st Cir. 2007) (concluding that alien's claim that his depression and nervous breakdown amounted to "extraordinary circumstances" excusing his late filing did not constitute a question of law and was therefore unreviewable).

The same division among the courts of appeals also exists in the context of humanitarian waivers. In *Cevilla*, 446 F.3d 658, a case involving the statutory eligibility standards for obtaining a waiver of removal, the Seventh Circuit found that Section 1252(a)(2)(D) did not encompass review "of the *application* of the 'continuous physical presence' standard to the facts of the case." *Id.* at 661 (emphasis in original). Accordingly, it dismissed the alien's claim, emphasizing that Section 1252(a)(2)(D) applies only to "pure" questions of law. *Id.*

In direct contrast, the Eighth Circuit has concluded that it has jurisdiction to "review . . . the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility" for a waiver. *Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008) (internal quotation marks and citation omitted).

In short, the courts of appeals are divided and have been for a number of years. The circuit split impacts hundreds of cases each year in a wide array of contexts. Moreover, as discussed below, the confusion is likely to become even greater in light of two recent BIA decisions.

B. The BIA's Recent Precedent Decisions Will Increase The Confusion Over Section 1252(a)(2)(D)'s Scope.

Significantly, the Fourth Circuit decision is also inconsistent with two recent decisions from the BIA. In *Matter of V-K-*, 24 I & N Dec. 500 (BIA May 8, 2008), the BIA squarely held that aliens do *not* raise factual claims where they challenge whether the IJ properly applied the CAT legal standards to the facts of their case. The BIA explained that while it reviewed the underlying facts for clear error, it reviewed *de novo* mixed questions of law and fact regarding the application of the CAT standard. Indeed, the BIA stated that it would "appear essential to the performance of our appellate function . . . that we possess the authority to review de novo findings deemed by an Immigration Judge to satisfy an ultimate statutory standard." *Id.* at 502.

In a companion case, *Matter of A-S-B-*, 24 I & N Dec. 493 (BIA May 8, 2008), the BIA came to the same conclusion in the context of asylum. There, the BIA stated that "[t]he question whether these uncontested facts were sufficient to establish a well-founded fear of persecution . . . was a legal

determination that was not subject to the clearly erroneous standard of review." *Matter of A-S-B-*, 24 I & N Dec. at 497.

The Fourth Circuit's ruling that petitioner raised only a factual claim is squarely at odds with these two BIA decisions. Moreover, the Fourth Circuit's ruling not only is inconsistent with this BIA precedent, but it created an untenable whipsawing effect on petitioner. Although the IJ granted petitioner CAT relief, the BIA reversed while stating expressly that it was not disturbing the IJ's factual findings. App. 29a n.1. Yet, when petitioner sought review in the court of appeals, the claim was suddenly deemed to be factual.[7]

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[7] The BIA decision in this case did not hinge on the "more likely than not" prong of the CAT standard, but rather, whether the circumstances of petitioner's case amounted to acquiescence. In any event, if the government were to argue that the "more likely than not" determination is a factual determination, the BIA would have had to accept the IJ's findings in this case (and indeed, the BIA stated that it *was* adopting the IJ's factual findings). *See* 8 C.F.R. 1003.1(d)(i). And if it is a legal issue before the Board (as the BIA in *Matter of V-K-* stated), then it would be reviewable as a legal issue in the court of appeals under Section 1252(a)(2)(D). *Matter of V-K-* at 501 ("[W]e do not consider a prediction of the probability of future torture to be a ruling of 'fact.'"); *id.* ("we conclude that an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured may be reviewed de novo").

In short, if the claim was legal before the BIA, it should have remained a legal claim before the court of appeals. And, of course, had the claim been factual before the BIA, petitioner would have prevailed because the BIA did not remotely suggest that any of the IJ's rulings were clearly erroneous.

* * *

The Fourth Circuit's decision in this case conflicts with the rulings and analysis of other circuits and with BIA precedent. The divergent views of the courts of appeals cannot be reconciled and there is little likelihood that the disagreements will resolve themselves through further lower court litigation. Indeed, each circuit has issued multiple jurisdictional decisions on this issue over a three-year period. The BIA's recent decisions in *Matter of V-K-* and *Matter of A-S-B-* have only created more confusion.

II. THE FOURTH CIRCUIT'S HOLDING IS INCORRECT.

The court of appeals' holding that petitioner did not raise a question of law within the meaning of Section 1252(a)(2)(D) is incorrect. Under this Court's precedents (as well as the BIA's recent case law), petitioner raised a question of law because he was not challenging the underlying factual determinations of the IJ, but rather the application of the governing legal standards to those facts. *See* Point 1, *infra*.

Nor is there any doubt that Congress intended to ensure review of the application of law to fact. The text of Section 1252(a)(2)(D), and the legislative history of the REAL ID Act, demonstrate that Congress did not intend to eliminate review over claims involving the application of legal standards to the underlying facts of a case. Moreover, under the Suspension Clause, there constitutionally must be review over the application of law to fact, as the Court in *Boumediene* made clear. *See* Point 2, *infra*.

1. As discussed above, this Court's cases have explained the difference between the underlying primary facts of a case and the application of the governing legal standards to those adjudicated or unchallenged facts. *See*, *e.g.*, *Ornelas*, 517 U.S. at 697. In this case, the Fourth Circuit erred by failing to distinguish between the primary underlying facts (which petitioner does not challenge) and the application of those facts to the legal standards governing CAT claims.

In particular, petitioner accepts the IJ's findings regarding the Haitian government's likely acquiescence (which the BIA also accepted, App. 29a-30a n.1): that the Haitian government would be "well-aware" of petitioner's return; that "torture exists in Haiti by both government forces and forces the government fails to control;" that "the Haitian government makes little or no effort to protect the rights of criminal deportees returned from the United States;" that members of the security forces violate prohibitions against torture; that there were

politically motivated killings and disappearances and other "surges of political violence;" that police "committed killings, disappearances and human rights violations;" that prisons in Haiti have insufficient facilities with deteriorated conditions; and finally, that petitioner would be "significantly more vulnerable than the 'generic criminal deportee'" due to his "connection to his politically prominent stepfather" and his status as the "child of a Haitian refugee residing in the United States." App. 46a-48a.

Petitioner's claim is that, on these adjudicated facts, he satisfied the acquiescence requirement. Indeed, if these facts do not satisfy the acquiescence ("willful blindness") standard, then the BIA will be able to effectively eviscerate the acquiescence standard by, *de facto*, forcing individuals to show government "consent." Yet the regulations expressly distinguish between "consent" and "acquiescence." *See* 8 C.F.R. 208.16(a)(7). In short, petitioner has raised a classic "application" claim.

Significantly, under the Fourth Circuit's analytical framework – which links the jurisdictional inquiry to the standard of review – the court never even examined the precise nature of petitioner's claim. Instead, the court of appeals purported to look to whether CAT acquiescence issues have *generally* been reviewed for substantial evidence. Yet whether such claims are properly deemed factual (and thus potentially subject to the substantial evidence test) turns on the *specific* type of error that the BIA is alleged to have made.

Notably, the Fourth Circuit's novel analytical approach of linking the Section 1252(a)(2)(D) jurisdictional inquiry to the proper standard of review has not been adopted by any other circuit. Moreover, the Fourth Circuit's assumption that claims involving the application of law to fact cannot be reviewed under the substantial evidence test is flatly inconsistent with the Ninth Circuit's position, which uses the substantial evidence test to review the application of law to fact. *See Ramadan* 479 F.3d at 657-58 (finding jurisdiction over "application" claim and stating that record did "not compel" a different result, which is the standard formulation for the substantial evidence test); *Apriyanto v. Gonzales*, 245 Fed. Appx. 646 (9th Cir. 2007) (unpublished) (stating that "[s]ubstantial evidence supports the IJ's denial of Apriyanto's asylum claim because Apriyanto failed to show changed or extraordinary circumstances to excuse the untimely filing of his asylum application"); *cf. Wang*, 320 F.3d at 142-43 (finding that alien raised a CAT claim involving "an application of facts to law" but reserving whether the proper standard of review was "substantial evidence" or "*de novo*" review).[8]

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[8] In determining that petitioner's claim was factual, the court in this case looked to three cryptic Fourth Circuit decisions that likewise failed to elaborate on the precise nature of the claim raised by the aliens in those cases. App. 14a-15a (citing *Dankam v. Gonzales*, 495 F.3d 113, 124 (4th Cir. 2007); *Haoua v. Gonzales*, 472 F.3d 227, 232-33 (4th Cir. 2007); *Dragenice v. Gonzales*, 470 F.3d 183, 185 (4th Cir. 2006)). In none of those cases did the alien raise a claim identical to the one petitioner raises here. *See Dankam*, 495 F.3d at 120-21 (challenging only factual credibility findings); *Haoua*, 472 F.3d at 233 (noting that alien waived

In sum, petitioner's claims are not factual. Rather, they raise "application of law" questions, which are reviewable, and constitutionally must be reviewable, under Section 1252(a)(2)(D).

2. The REAL ID Act was not intended to eliminate any review previously available in habeas. The Conference Report specifically states that the "purpose of [new Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas." H.R. Rep. No. 109-72, 175 (2005). Indeed, the Report expressly contrasts the REAL ID Act provisions with the 1996 jurisdiction-stripping amendments and emphasizes that the Act was not intended to "eliminate judicial review," but simply to restore "such review to its former settled forum prior to 1996." *Id.*; *see Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review"); *Ramadan*, 479 F.3d at 653-54 (same); *Kamara v. Attorney General*, 420 F.3d 202, 211, 213-15 (3d Cir. 2005) (finding that the scope of review under REAL ID Act "mirrors" scope of habeas review).[9]

CAT acquiescence challenge); *Dragenice*, 470 F.3d at 187 (reviewing challenge to whether alien was a U.S. national).

[9] Nor, in fact, is petitioner aware of the government taking the position that the scope of review under the REAL ID Act is narrower than that previously available in habeas (or constitutionally could be narrower).

Habeas review has traditionally included claims involving both the proper interpretation of statutes *and* their application. In *St. Cyr*, this Court reviewed the history of habeas law in the immigration area and found that there was review of both the "interpretation and application of statutes." 533 U.S. at 302. More recently, the Court stated emphatically that it viewed as "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous *application* or interpretation' of relevant law." *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (emphasis added) (quoting *St. Cyr*, 533 U.S. at 302); *see also id.* at 2274 ("MCA § 7 thus effects an unconstitutional suspension of the writ.").

Further, in both *Boumediene* and *St. Cyr*, the Court stressed that habeas review has been at its most robust in cases involving executive detention (as opposed to the criminal context where there has been prior judicial review). *Boumediene*, 128 S. Ct. at 2266-69; *St. Cyr*, 533 U.S. at 301-03.

Following this Court's historical analysis, the courts of appeals have likewise noted that habeas review has always encompassed claims involving the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on history of habeas law to conclude that "the phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts"); *Chen*, 471 F.3d at 326-27 (finding that the

"application" of statutes and regulations was traditionally reviewable in habeas); *Kamara* 420 F.3d at 213-15 (3d Cir. 2005) (same).[10]

Given the Suspension Clause and Congress' clear intent to preserve the scope of habeas review, there is no basis to narrowly construe the reference to "questions of law" in Section 1252(a)(2)(D) to exclude claims involving the application of law to fact. *See St. Cyr*, 533 U.S. at 299-300 (finding it "fairly possible" to construe the 1996 jurisdictional provisions to avoid the "serious" Suspension Clause issues that would have been triggered by precluding

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[10] Some courts have cited the statement in the REAL ID Act's Conference Report that the "purpose of [Section 1252(a)(2)(D)] . . . is to permit judicial review over those issues that were historically reviewable on habeas – constitutional and statutory-construction questions, not discretionary or factual questions." H.R. Rep. No. 109-72, 175 (2005). *See, e.g.*, *Almuhtaseb*, 453 F.3d at 747-48 (discussing Conference Report); *Diallo*, 447 F.3d at 1282 (same). But that passage is not an exhaustive recitation of *all* legal claims that were reviewable in habeas. The Report is simply distinguishing legal claims from "factual" and "discretionary" claims. If the passage were read to be exhaustive, then the REAL ID Act would preclude review even over *pure* questions of law regarding the proper interpretation of *regulations*. That would directly contradict this Court's precedent and render the statute unconstitutional. *See St. Cyr*, 533 U.S. at 307 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), for the proposition that habeas review encompasses claims involving the proper interpretation and application of regulations). *See Ramadan*, 479 F.3d at 653-54; *Chen*, 471 F.3d at 327-30.

all review over a claim that was traditionally cognizable in habeas); *Ramadan*, 479 F.3d at 652-54 (construing Section 1252(a)(2)(D) to cover claims involving the application of law to fact, stating that "a narrower interpretation would pose a serious Suspension Clause issue"); *Chen*, 471 F.3d at 326-27 (same); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-42 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards). Because petitioner does not challenge the primary facts found by the IJ, but rather, raises a claim involving the application of law to fact, the Fourth Circuit erred in finding his claims unreviewable under Section 1252(a)(2)(D).

* * * *

Judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself. *See Ornelas,* 517 U.S. at 696. Without such review, an agency could effectively change a legal standard by consistently announcing the correct legal rule but *de facto* applying a standard that is more stringent than the one formally announced. Indeed, that is precisely what happened in this case and is happening routinely in CAT cases, as the BIA summarily denies torture claims (even when the claim is granted by the immigration judge). The Court's review is warranted to provide guidance to the courts of appeals on the

scope of their jurisdiction under Section 1252(a)(2)(D). Not only is there an entrenched and deep circuit split, but the issue is one of broad practical importance.

This case, moreover, is a particularly good vehicle to address the scope of Section 1252(a)(2)(D). Unlike other cases, the BIA in this case stated expressly that it accepted all of the IJ's factual findings. Accordingly, this case squarely presents the Court with the jurisdictional issue on which the courts of appeals are divided – the extent to which the term "questions of law" covers challenges in which the alien accepts the underlying primary facts of the case and argues instead that, on those facts, he satisfied the governing legal standard.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 2008

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-2304

MACKENTOCH SAINTHA,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. (A25-448-372)

Argued: November 1, 2007

Decided: February 14, 2008

Before GREGORY and DUNCAN, Circuit Judges, and James A. BEATY, Jr., Chief United States District Judge for the Middle District of North Carolina, sitting by designation.

Petition for review dismissed in part and denied in part by published opinion. Judge Duncan wrote the opinion, in which Judge Gregory and Judge Beaty joined.

COUNSEL

ARGUED: John R. Ingrassia, PROSKAUER & ROSE, L.L.P., Washington, D.C.; Elizabeth Hutton McGrail, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, Washington, D.C., for Petitioner. Janice Kay Redfern, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Peter D. Keisler, Assistant Attorney General, Civil Division, Linda S. Wernery, Assistant Director, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

OPINION

DUNCAN, Circuit Judge:

The petitioner, Mackentoch Saintha ("Saintha"), was admitted to this country as a refugee and was subsequently granted lawful permanent resident status. When later convicted of an aggravated felony and placed into removal proceedings, Saintha sought relief pursuant to Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT"), Dec. 10. 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85, and under section 209 of the Immigration and Nationality Act (the "INA"), codified at 8 U.S.C. § 1159(c). An Immigration Judge ("IJ") found Saintha entitled to deferral of removal under the CAT, but ineligible for adjustment of status and a waiver of inadmissibility under the INA. On review, the Board of Immigration Appeals ("BIA") found insufficient evidence to sustain the CAT claim, but agreed with the IJ that Saintha was ineligible for the relief he sought under the INA. Saintha's petition asks us to review both BIA determinations. For the reasons that follow, we dismiss the portion of Saintha's petition requesting relief under the CAT for lack of jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(C), and we deny the petition as to Saintha's requests for adjustment of status and a waiver of inadmissibility under the INA.

I.

Saintha, along with his family, fled his native Haiti in 1994 to escape political violence. He was subsequently admitted to the United States as a refugee pursuant to 8 U.S.C. § 1157. In October 1995, he sought and was granted an adjustment to lawful permanent resident ("LPR") status under section 209(a) of the INA, 8 U.S.C. § 1159(a), retroactive to his admission date. After multiple convictions for petty larceny, Saintha was convicted of robbery and sentenced to fifteen years' confinement.[1] As a result of this aggravated felony conviction, the government charged him with removability under 8 U.S.C. § 1227(a)(2)(A)(iii). *See id.* ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.")

In the ensuing removal proceedings, Saintha sought deferral of removal pursuant to the implementing regulations of the CAT. *See* 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(b)(1). To be entitled to deferral of removal, the applicant must "establish that it is more likely than not that he [will] be tortured if removed to the proposed country of removal."[2] 8 C.F.R. § 208.16(c)(2). An act is not

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[1] Ten years of Saintha's sentence were subsequently suspended.

[2] The implementing regulations define torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as

"torture" for CAT purposes unless it is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1).

Saintha argued at his removal hearing that, if he were returned to Haiti, he would more likely than not be tortured with the acquiescence of the Haitian government in retribution for the involvement of his stepfather, Edy Lorisme, in the political party Organisation Populaire de Bon-Repos ("OPB").[3] In support of Saintha's claim, Lorisme testified that his sister was beaten and killed in 1988 because of her affiliation with OPB. Saintha and Lorisme also both testified to an instance in 1992 when Lorisme's political opponents came to the family's home in the early hours of the morning and ordered Lorisme outside. According to Saintha, Lorisme did not leave the house and the group dispersed without further incident. After this episode, however, Lorisme

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obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind." 8 C.F.R. § 208.18(a)(1).

[3] OPB was formed to oppose Jean-Claude "Baby Doc" Duvalier and his supporters, including General Cedras—the leader of the Haitian government at the time OPB was founded.

sought and obtained refugee status for himself and his family, and they fled Haiti for the United States.

Saintha and Lorisme further testified that their friends and relatives continued to be victimized by politically motivated violence after their departure. They explained that shortly after the family's arrival to the United States, a friend and political ally and his wife were killed in Haiti in retaliation for their political activities. They also alleged that Lorisme's political enemies forced Lorisme into hiding when he visited Haiti in 2003, and that these enemies subsequently burned Saintha's grandmother to death. Shortly after Lorisme's return to the United States, the family learned that a cousin of the Saintha's had also been killed. Although unaware of the details of the cousin's death, Saintha and Lorisme insisted that she was killed for her political beliefs.

As to the Haitian government's involvement, Lorisme testified that he did not know "what power [the Haitian police] have . . . to protect" his son, and that the police did not protect anyone. J.A. 123. Saintha submitted as additional evidence the State Department's 2005 Country Report on Human Rights Practices in Haiti. The Report indicated that there was widespread political corruption in Haiti, that prison conditions were substandard, and that the Haitian police were guilty of human rights violations and did little to protect Haitian citizens.

During the removal proceedings, Saintha also sought relief in the form of an adjustment of status under 8 U.S.C. § 1159(a), and in conjunction with that adjustment, a waiver of inadmissibility under § 1159(c). Saintha sought such relief because, though he had previously been granted LPR status, the imminent removal order would strip him of such status and with it the consequent right to remain legally in the United States indefinitely as a lawful permanent resident. *See* 8 C.F.R § 1001.1(p). Furthermore, even if he were granted deferral of removal under the CAT, he still would not have regained his permanent resident status. *See* 8 C.F.R. § 208.17(d). Such deferral, if granted, would also be subject to termination in the future if an immigration judge determined that it was no longer likely that Saintha would be tortured in the country to which he would be removed. *See id.* In light of these limits to CAT relief, Saintha therefore sought to adjust a second time to LPR status under § 1159(a) in order to remain in the United States permanently. His multiple criminal convictions, however, rendered him inadmissible, and therefore ineligible for adjustment of status. *See* 8 U.S.C. § 1182(a)(2)(B) ("Any alien convicted of 2 or more offenses . . . , regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is

inadmissible."). Accordingly, he was unable to adjust his status absent a discretionary waiver of inadmissibility, pursuant to § 1159(c), from either the Secretary of Homeland Security or the Attorney General.

On April 10, 2006, the IJ found Saintha removable as charged. The IJ then granted his request for deferral of removal under the CAT, but found him ineligible for an adjustment to LPR status and a waiver of inadmissibility under the INA. These rulings prevented Saintha from being immediately removed to Haiti, but left open that possibility in the future should the country conditions improve. Both Saintha and the government appealed their respective unfavorable rulings to the BIA.

In an opinion issued November 16, 2006, the BIA reversed the IJ's decision finding Saintha eligible for relief under CAT, but affirmed the IJ's decision as to Saintha's request for adjustment of status and waiver of inadmissibility. Regarding Saintha's CAT claim, the BIA found (1) no clear error in the IJ's findings of fact; (2) that the Haitian government and Lorisme's enemies would have the ability to learn of Saintha's return to Haiti; and (3) that it was more likely than not that Lorisme's enemies would seek to torture Saintha. The BIA nevertheless denied the claim, finding that, "upon considering the record in its totality there is

insufficient evidence . . . that the Haitian government would acquiesce in [Saintha's] torture." J.A. 292.

As to Saintha's requests for relief under the INA, the BIA found that under the plain language of § 1159(a)(1) a refugee who has already acquired LPR status is precluded from subsequently re-adjusting to LPR status. Inasmuch as Saintha could not seek adjustment of status, he was likewise ineligible to seek a waiver of inadmissibility under § 1159(c). Saintha filed a timely appeal and obtained a temporary stay of removal on January 9, 2007.

II.

Saintha first argues that the BIA erred in finding insufficient evidence to conclude that the Haitian government would likely acquiesce in his torture, and in finding him ineligible for deferral of removal under the CAT as a result. Before we reach the merits of that argument, however, we must first determine whether we have jurisdiction to consider Saintha's claim. The government contends that we do not, asserting that because Saintha is removable by reason of an aggravated felony conviction and has not, in its view, raised a constitutional claim or question of law, the INA precludes judicial review of his claim. We consider the issue de novo. *See Rux v. Republic of Sudan*, 461 F.3d 461, 467 (4th Cir. 2006).

A.

Courts generally do not have jurisdiction to review final orders of removal against aliens charged with removability by reason of having committed aggravated felonies. *See* 8 U.S.C. § 1252(a)(2)(C); § 1227(a)(2)(A)(iii). Because Saintha has conceded that he was convicted of an offense that constituted an aggravated felony, we would ordinarily be without jurisdiction to consider his claims. The REAL ID Act ("REAL ID"), however, provides a limited exception to this jurisdictional bar. Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 302-23 (codified in part at § 1252(a)(2)(D)). Section 1252(a)(2)(D) of the Act allows for "review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals."

This court has previously recognized the narrow scope of this exception. *See Higuit v. Gonzales,* 433 F.3d 417, 419 (4th Cir. 2006) (holding that REAL ID "confers upon courts of appeals a narrowly circumscribed jurisdiction to resolve constitutional claims or questions of law."). We have held, consonant with the other circuit courts of appeal, that even after the passage of REAL ID, we still lack jurisdiction to review factual determinations of the BIA. *See Jean v. Gonzales*, 435 F.3d 475, 480 (4th Cir. 2006); *Conteh v. Gonzales*, 461 F.3d 45, 63 (1st Cir. 2006) ("This proscription extends to review of the BIA's factual findings as to

credibility, evidentiary weight, and satisfaction of a correctly framed burden of proof."); *see also* H.R. Rep. No. 109-1268, at H2873 (2005), available at 2005 WL 1025891 (legislative history of the REAL ID Act explaining that "[t]he purpose of [the REAL ID Act] is to permit judicial review over those issues that were historically reviewable on habeas—constitutional and statutory—construction questions, not discretionary or factual questions."). Thus, before we can reach the merits of Saintha's arguments, we must first decide the threshold question of whether his petition raises a constitutional claim or a question of law such that the REAL ID exception applies, or instead raises only factual questions, stripping us of our jurisdiction over the petition.

B.

Saintha's petition seeks review of the BIA's rejection of his CAT claim. As noted above, the BIA found it probable that the enemies of Saintha's stepfather would seek to torture Saintha upon his return to Haiti. The BIA further found, however, that "upon considering the record in its totality there is insufficient evidence for us to conclude that it is more likely than not that the Haitian government would acquiesce in [his] torture." J.A. 292. The crux of the jurisdictional question here, then, is whether this BIA determination with respect to Haitian

government acquiescence is properly characterized as factual or legal in nature.

Saintha wisely does not argue that his challenge raises a constitutional claim or a pure question of law. Rather, he asserts that this case presents a mixed question of law and fact, and that we retain jurisdiction as to the legal component of that question. *See* H.R. Rep. No. 109-1268, at H2873 (2005), available at 2005 WL 1025891 ("When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements."). The government predictably disagrees with that characterization of the BIA's determination. Saintha's claim, the government asserts, does not concern a "question of law" because such questions, for REAL ID purposes, include only the narrow category of issues regarding statutory construction.[4] Instead, the government reasons, Saintha's claim is merely "an attempt to circumvent [Section 1252(a)(2)(C)'s] jurisdictional bar by inviting this [c]ourt to reweigh the evidence relevant to a [BIA] factual determination." Respondent's Br. at 41.

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[4] There is disagreement among the circuits regarding whether questions of law are limited to questions of statutory interpretation or also include mixed questions of law and fact. We need not resolve the issue here because our precedent dictates that we treat Saintha's claim as a factual inquiry.

Although we have never addressed the precise question of our jurisdiction to review, post-REAL ID, an aggravated felon's petition challenging a BIA determination regarding government acquiescence in torture for CAT purposes, we do not have to look far to find compelling guidance as to the appropriate analytical framework. This court has previously concluded that BIA factual determinations include those which we would review, if we were to have jurisdiction, under the "substantial evidence" standard.[5] *See Menghesha v. Gonzales*, 450 F.3d 142, 147 (4th Cir 2006) (referring to the substantial evidence standard as "the extremely deferential standard of review applicable to [BIA] factual determinations."); *see also Haoua v. Gonzales*, 472 F.3d 227, 231 (4th Cir. 2007) (same). That is, we can look to the standard of review we would apply if we were to have jurisdiction to inform whether a given BIA determination is factual or legal in nature.

The legislative history of the REAL ID Act confirms precisely this point:

> Factual questions include those questions that courts would review under the "substantial evidence" or 242(b)(4)(B) [codified as 8 U.S.C. §

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[5] In contrast, legal determinations include those which we would review de novo. *See Menghesha v. Gonzales*, 450 F.3d 142, 147 (4th Cir. 2006).

> 1252(b)(4)(B)] standard, reversing only when a reasonable factfinder would be compelled to conclude that the decision below was erroneous.

H.R. Rep. No. 109-1268, at H2873 (2005), available at 2005 WL 1025891. Combining our precedent, as bolstered by the legislative history, with the § 1252(a)(2)(D) proscription, we conclude that BIA determinations that we would ordinarily review under the substantial evidence standard are necessarily factual in nature, and therefore beyond our jurisdiction to review when the petitioner has been convicted of an aggravated felony.

The question of jurisdiction here, then, turns on whether the BIA's determination as to Haitian government acquiescence would ordinarily be reviewed for substantial evidence. Our precedent declares that it would be. *See Dankam v. Gonzales*, 495 F.3d 113, 124 (4th Cir. 2007) ("We review the denial of relief under the CAT for substantial evidence."); *Haoua*, 472 F.3d at 232-33 (applying the "substantial evidence" standard of review to a BIA finding concerning the likelihood that the petitioner would suffer torture at the government's consent or acquiescence). Because we review determinations regarding governmental acquiescence for substantial evidence, and because we only apply that standard to factual determinations, the BIA's CAT determination here is properly characterized as factual, not legal, in

nature.[6] *Id.*, *see also Dragenice v. Gonzales*, 470 F.3d 183, 185 (4th Cir. 2006) (referring to the IJ's conclusion "that the evidence did not establish a likelihood of torture" as a "factual determination"). Section 1252(a)(2)(C) of the REAL ID Act prohibits our review of such factual determinations of the BIA, and we are thus unable to review Saintha's petition on the merits.

Notwithstanding this conclusion, dictated by our precedent, Saintha repackages his primary argument in various ways in an attempt to create a reviewable legal question where there is none. For example, Saintha professes to challenge the BIA's interpretation of the term "acquiescence," claiming that the BIA "fail[ed] to recognize the inherent difference between a government that cannot control torture by private actors and a government that 'acquiesces' by turning a blind eye toward such conduct." Reply Br. at 13. As Saintha acknowledges, however, the BIA properly concluded that willful

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[6] Oddly, Saintha appears at times to concede just this conclusion. . For example, he acknowledged that the case presented a factual determination in his argument before the IJ, J.A. 74, and again in this appeal, *see* Reply Br. at 11 (referring to the BIA's conclusion regarding the likelihood of government acquiescence as a "factual determination" properly reviewed under the "'substantial evidence" standard of review"). Because he elsewhere argues the opposite, however, we have not treated these apparent concessions as dispositive.

blindness could constitute acquiescence, but ultimately rejected his claim because the evidence did not demonstrate that the Haitian government would likely remain willfully blind to his risk of torture. *See* J.A. 292-93; Petitioners Br. at 16. In actuality, then, Saintha is asking us to reach the merits of his CAT claim and reweigh the evidence as to the BIA's acquiescence determination; not, as he claims, presenting the legal question of the proper interpretation of "acquiescence."

Saintha next attempts to craft a question of law by suggesting that the BIA did not afford the appropriate deference to the facts as determined by the IJ. Saintha later admits, however, that the BIA cited the appropriate legal standards in its decision, and he points to no specific language in the BIA's opinion where those standards were misapplied. His argument, in substance, is simply that the BIA did not show the appropriate deference to the IJ by disagreeing with the IJ's government-acquiescence determination. This argument too, then, devolves into another circuitous attack on the BIA's factual determination regarding acquiescence, over which, as we have already concluded, we lack jurisdiction.

Saintha finally seeks to create a justiciable question by arguing that "the BIA misapplied its own precedent with respect to evaluating [Saintha's] risk of torture." Reply Br. at 14. Rather than identifying BIA precedent that would mandate a different

conclusion in his own case, however, Saintha only posits vaguely that the BIA should be required to distinguish his case from prior BIA decisions. Again, because Saintha does not point to any standard that the BIA misapplied, this argument would have us reweigh the evidence in Saintha's case as compared to the weighing done in past BIA cases, which is precisely the type of factual re-hashing we must not do.

We decline to stretch reason to locate questions of law in what we have properly analyzed as a factual determination. As this court has previously recognized, "[w]e are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive." *Higuit v. Gonzales*, 433 F.3d 417, 420 (4th Cir. 2006). Accordingly, we look to the true nature of Saintha's arguments and conclude that they do not fall within one of the REAL ID Act's rubrics. Thus, because Saintha is removable by reason of an aggravated felony conviction, § 1252(a)(2)(C) prohibits our evaluation of his CAT claim. We therefore dismiss this portion of the petition for review for lack of jurisdiction.[7]

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[7] We note briefly that even if we were not stripped of jurisdiction by § 1252(a)(2)(C)-(D) to hear Saintha's claim, it

III.

Saintha next challenges the BIA's determination that he is statutorily precluded from seeking adjustment of status and a waiver of inadmissibility under § 1159 of the INA. This claim turns squarely on an issue of statutory interpretation. We therefore have jurisdiction to review this aspect of the petition pursuant to the REAL ID Act. *See* 8 U.S.C. § 1252(a)(2)(D).

We review de novo the BIA's decision on a question of law. *See Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 278 (4th Cir. 2004). As the BIA is the agency charged with administering the INA, however, its interpretations of the statute are entitled to deference as articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Pursuant to *Chevron*, the plain meaning of the statute controls if the provision in question is unambiguous. 467 U.S. at 843. If, however, the statute is silent or ambiguous with

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would likely fail because there exists substantial evidence to support the BIA's determination. Saintha, failed to make the requisite showing that the Haitian government was aware of, let alone willfully blind to, the violence suffered by his family members and his stepfather's political allies. *See* 8 C.F.R. § 208.18. Thus, we would likely conclude that the BIA relied on substantial evidence in finding a lack of government acquiescence.

respect to the specific issue before us, the question for this court becomes whether the BIA's interpretation "is based on a permissible construction of the statute." *See id.* A petitioner asking the court to find a BIA interpretation impermissible faces a substantial burden, as judicial deference "is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations." *Aguirre-Aguirre,* 526 U.S. at 425 (internal quotations omitted).

As discussed above, Saintha had become a lawful permanent resident, entitled to remain in the United States indefinitely. By virtue of his aggravated felony conviction, however, he is now removable, and entry of a removal order would strip him of his LPR status. In the course of his removal proceedings, Saintha sought, as an alternative and in addition to CAT relief, an adjustment of status back to that of a lawful permanent resident. The criteria governing adjustment of status are provided by section 209 of the INA, codified at 8 U.S.C § 1159:

> **§ 1159. Adjustment of status of refugees**
>
> (a) Criteria and procedures applicable for admission as immigrant; effect of adjustment.

(1) Any alien who has been admitted to the United States under [8 U.S.C. § 1157] . . .

(A) whose admission has not been terminated . . .

(B) who has been physically present in the United States for at least one year, and

(C) *who has not acquired permanent resident status,*

shall, at the end of such year period, return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant . . . .

(2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of the alien's inspection and examination shall...be regarded as lawfully admitted to the

> United States for permanent residence as of the date of such alien's arrival into the United States . . . .
>
> (b) . . . .
>
> (c) . . . . [T]he Secretary of Homeland Security or the Attorney General may waive [the application of any inadmissibility provision] with respect to [any alien seeking adjustment of status under this section] for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

Id. (emphasis added). The parties agree that this statute requires an alien to be "admissible" before he can be granted adjustment of status. Saintha concedes that his felony convictions render him inadmissible. Thus, his request for adjustment of status under § 1159(a) is accompanied, as it must be, by a request for waiver of inadmissibility under § 1159(c).

The parties disagree, however, as to the proper interplay of subsections (a)(1) and (a)(2). The government suggests that subsection (a)(1) provides three criteria that must be satisfied by any alien seeking adjustment of status, regardless of whether a Department of Homeland Security ("DHS") officer determines the alien's compliance with such criteria

(as suggested in subsection (a)(1)) or an IJ makes the determination (as suggested in subsection (a)(2)). Put differently, the government views subsection (a)(2) to simply acknowledge that, for aliens in removal proceedings, the determinations usually made by DHS officials are instead consolidated before the IJ so that the alien's legal status can be adjudicated holistically. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 194 (4th Cir. 2007) (recognizing that, once an alien is in removal proceedings, the presiding IJ has jurisdiction to decide questions of adjustment of status, which determination would otherwise be made by DHS officials). Because Saintha does not satisfy the third criterion of § 1159(a)(1)–i.e., that the alien "has not acquired permanent resident status,"–the government concludes that he cannot be eligible for adjustment of status, whether before a DHS official or an IJ.

Saintha argues, on the contrary, that subsection (a)(1) is directed only to newly admitted refugees, while subsection (a)(2) applies both to newly admitted refugees and to those who are seeking an adjustment in immigration proceedings. That is, he reads subsection (a)(2) to provide a stand-alone path to achieving LPR status: "Any alien who is found . . . after a hearing before an immigration judge to be admissible . . . shall . . . be regarded as lawfully admitted to the United States for permanent

residence," § 1159(a)(2). As nothing in subsection (a)(2) imposes a limit on the number of times an alien originally admitted as a refugee may pursue adjustment of status, nor otherwise harkens back to the three criteria of subsection (a)(1), Saintha claims that he is eligible for such relief. This interpretation is more logical, he argues, because it renders both refugees convicted of crimes before adjusting to LPR status and those that commit crimes after such an adjustment eligible to seek discretionary relief through a waiver of inadmissibility and adjustment to LPR status.

Though we find the government's reading of the statute the more persuasive of the two, we need not resolve the question de novo. Instead, assuming without deciding that the statute could be read either way, we find the BIA's interpretation to be "based on a permissible construction of the statute" and therefore controlling. *See Chevron*, 467 U.S. at 843.

The BIA read subsection (a)(1) to provide three criteria that must be met by any alien seeking adjustment of status. Because Saintha concedes that he "has [already] acquired permanent resident status" once in the past, the BIA ruled, that he cannot satisfy the third criterion and therefore cannot achieve adjustment of status a second time. The BIA found that Saintha is likewise ineligible to seek a waiver of inadmissibility under § 1159(c) because such a waiver is only available to aliens

seeking adjustment of status and would be futile outside of that context.

The BIA's interpretation certainly qualifies as a permissible construction of the statute. Section 1159(a)(1) sets out the "criteria and procedures" for an alien, admitted as a refugee, to adjust his status to that of a LPR. Among this list of criteria is § 1159(a)(1)(c), which limits the relief to aliens "who ha[ve] not acquired permanent resident status." Thus, it is logical to conclude that an alien such as Saintha, who has previous acquired permanent resident status but was later rendered removable by the commission of multiple crimes, is ineligible to acquire LPR status again under § 1159. *See Gutnik v. Gonzales,* 469 F.3d 683, 690 (7th Cir. 2006) (deferring to the BIA in adopting a similar interpretation of § 1159). Further, this interpretation is in accord with the Attorney General's stated policy of granting "favorable adjustments of status to violent or dangerous individuals [only] in extraordinary circumstances." *See In re Jean*, 23 I&N Dec. 373, 383 (2002). The BIA was charged with construing § 1159 in its entirety and applying it to Saintha's request for relief. In doing so, it determined that § 1159(a)(1)(c) prohibited him from seeking adjustment of status and, likewise, a waiver of inadmissibility. The possibility that a subsection of that statute could perhaps lead another decisionmaker to a different

conclusion only reinforces the ambiguity of the statute. It does not, however, render the BIA's interpretation impermissible so as to overcome the substantial deference the BIA is owed. In light of that deference, we deny Saintha's petition for review as to his requests for adjustment of status and a waiver of inadmissibility.

IV.

For the foregoing reasons, the petition for review is

DISMISSED IN PART AND DENIED IN PART.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A25 448 372 – Arlington Date: NOV 16 2006

In re: MACKENTOCH SAINTHA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
John R. Ingrassia, Esquire

ON BEHALF OF DHS:
Mona Maria Yousif
Assistant Chief Counsel

AMENDED DECISION

ORDER:

PER CURIAM. To correct an error in our original decision, the Board's order of October 3, 2006, in this matter is hereby vacated and the proceedings reinstated upon the Board's own motion. 8 C.F.R. § 1003.2(a). A final order in the matter is hereby issued as of this date, incorporating by reference the text of the attached vacated order, with

the following exception: on page five in the Further Order the word "Jamaica" is hereby corrected to read "Haiti."

/s/ Roger Pauley
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A25 448 372 – Arlington Date: OCT 03 2006

In re: MACKENTOCH SAINTHA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
John R. Ingrassia, Esquire

ON BEHALF OF DHS:
Mona Maria Yousif
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] –
Convicted of aggravated felony

APPLICATION: Adjustment of status; deferral of removal under Convention Against Torture

By an order dated April 10, 2006, the Immigration Judge sustained the single charge of removability against the respondent, pretermitted his request for a waiver of inadmissibility pursuant to section 209(c) of the Immigration and Nationality Act, and granted his request for deferral of removal pursuant to the Convention Against Torture. The respondent and the Department of Homeland Security ("DHS") have both filed timely appeals of the Immigration Judge's decision. On appeal, the respondent argues that the Immigration Judge erred in pretermitting his application for adjustment of status pursuant to section 209(a) of the Act, 8 U.S.C. § 1159(a), as well as his section 209(c) waiver of inadmissibility. The DHS, in turn, avers that the Immigration Judge erred in finding that the respondent established his entitlement to deferral of removal under the Convention Against Torture. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e). The respondent's appeal will be dismissed. The DHS's appeal will be sustained.

The record reflects that the respondent, a native and citizen of Haiti, was conditionally admitted to the United States as a refugee on May 11, 1994.[1] On October 2, 1995, he adjusted his status

[1] Following our review of the record of proceedings, we find no clear error in the Immigration Judge's findings of fact, and we shall credit the testimony of both the respondent and his father.

to that of a lawful permanent resident pursuant to section 209(a) of the Act. Subsequently, the respondent was convicted of various criminal offenses, including robbery in violation of the Virginia state law. *See* Exh. 2. On the basis of that conviction, the respondent was sentenced to 15 years' confinement, all but 5 years suspended. *See id. See generally* VA. CODE ANN. § 18.2-58. Thereafter, the DHS placed him into removal proceedings via the issuance of a Notice to Appear ("NTA"). *See* Exh. 1. During the prior hearing, the respondent, through counsel, admitted the allegations in the NTA and conceded that he is removable as an alien convicted of an aggravated felony, as that term is defined under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G).[2]

Mr. Edy Lorisme. *See* 8 C.F.R. § 1003.1(d)(3)(i). Notably, in the transcription of both witnesses' testimony, the term "indiscernible" appears numerous times in the place of actual phrases and words used. However, insofar as neither party has raised the issue, we find it unnecessary to remand the matter.

[2] The respondent submitted various applications for removal relief after May 11, 2005. His claims are therefore governed by the amendments to the Act brought about by the passage of the REAL ID Act of 2005 ("REAL ID Act"). *See* section 101(h)(2) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Div. B, Pub. L. No. 109-13, 119 Stat. 23 (to be codified in various sections of 8 U.S.C.), indicating that its provisions apply to claims for removal relief filed on or after May 11, 2005, the date of the REAL ID Act's enactment. *See generally* section 240(c)(4) of the

Initially, we shall consider whether the respondent is eligible to seek adjustment of status or a section 209(c) waiver of inadmissibility. Pursuant to section 209(a)(1) of the Act, an alien who has been admitted to the United States as a refugee may adjust his status to that of a lawful permanent resident if the following elements can be established: (1) that the applicant's conditional admission has not been terminated; (2) that he has been physically present in this country for at least 1 year; and (3) that he "has *not* acquired permanent resident status." *See* section 209(a)(1)(A)-(C) of the Act (emphasis added); *see also Matter of Smriko*, 23 I&N Dec. 836, 838 (BIA 2005). *See generally* section 207 of the Act, 8 U.S.C. § 1157. As noted above, in this case the record reflects that the respondent has already acquired status as a lawful permanent resident, which he will maintain until after the entry of a final administrative order of removal in his case. *See, e.g.*, Exh. 1; 8 C.F.R. § 1001.1(p); *see also Matter of Gunaydin*, 18 I&N Dec. 328 (BIA 1982). Under the plain language of this statute, we find that the respondent is precluded from adjusting his status pursuant to section 209(a)(1) of the Act. Moreover, inasmuch as the respondent cannot seek adjustment under section 209 of the Act, we likewise conclude

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Act, 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1208.16(c)(2); *Matter of Y-L-*, 23 I&N Dec. 270, 284 (A.G. 2002).

that he is ineligible to seek a section 209(c) waiver of inadmissibility. Thus, we find no error in the Immigration Judge's determination to pretermit the respondent's request for a waiver of inadmissibility under section 209(c) of the Act.

Accordingly, we now turn to the respondent's alternative request for deferral of removal pursuant to the Convention Against Torture. The Convention Against Torture prohibits the return of an alien to a country where it is more likely than not that he will be subject to torture by a public official, or at the instigation or with the acquiescence of such an individual. *See* 8 C.F.R. §§ 1206.16(c); 1208.18(a). In determining whether an alien is entitled to protection, all evidence relevant to the possibility of future torture will be considered, including, but not limited to: past torture inflicted upon the alien; evidence that the alien could relocate to another part of the country of removal where he is not likely to be tortured; gross, flagrant, or mass violations of human rights; and other relevant information regarding conditions in the country of deportation. *See* 8 C.F.R. § 1208.16(c)(3). Nonetheless, it is not enough for an alien to string together a chain of speculative events. *See Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006). To the contrary, to establish his entitlement to relief, he must show that it is more likely than not that each event will take place upon his removal.

In contesting the Immigration Judge's determination that the respondent established his eligibility for deferral of removal, the DHS principally argues that respondent has failed to demonstrate that the Haitian government would acquiesce in his torture. Specifically, the DHS contends that before the respondent may demonstrate his entitlement to relief, he must prove a clear probability that all of the following events will take place: (1) that the Haitian government, as well as his stepfather's foes, would be aware of his return to that nation; (2) that Mr. Lorisme's enemies would seek to torture the respondent; and (3) that the Haitian government, knowing of the respondent's risk of harm from these non-state actors, would nonetheless acquiesce in the tortuous activity. In response, the respondent asserts that he need only show that the Haitian government would turn a blind eye to his risk of torture in order to establish that the harm he fears would be with the acquiescence of a public official. It is within this context that we will consider the respondent's case.

According to the State Department, Haitian "[c]itizens deported to the country after completing prison sentences in foreign countries were detained until a family member agreed to take custody of them." Exh. 3, tab 6 at 6 (reporting that these detentions took place despite the fact that "there is no provision for such detention in the law"); *see also*

Matter of J-E-, 23 I&N Dec. 291, 300-01 (BIA 2002). As such, the Haitian government would undoubtedly be aware of the respondent's deportation. The record also provides sufficient evidence from which we could infer that there is a clear probability that his stepfather's enemies would likewise learn of the respondent's return to Haiti. For instance, Mr. Lorisme testified that when he last returned to Haiti in 2003, he was forced to go into hiding within 10 days of his arrival to avoid being attacked on account of his past political activities.[3] *See* I.J. at 4-5; *see also* Tr. at 52-53; Exh. 3, tab 6 at 1, 4-5 (reporting on the continued practice of jailing the government's political opponents). In addition, we find that the respondent's risk of being identified by his stepfather's political enemies is further heightened due to the fact that the only way he can secure his release from prison is with the assistance of a family member, and the only family member still living in Haiti is one of Mr. Lorisme's sisters. *See* Exh. 3, tab 6 at 6; *see also* Tr. at 67. *See generally* Tr. at 74-76 (testifying that the respondent is recognizable, and would require his assistance in settling back into Haitian society); Exh. 3, tab 6 at 3-4 (reporting a

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[3] Tragically, when Mr. Lorisme could not be located, his foes targeted the respondent's grandmother instead, burning her alive. *See* I.J. at 5; Tr. at 54-55. *See generally* Exh. 3, tabs 4 and C (describing the past abuses suffered by the respondent, as well as his other family members).

decline in the country's prison conditions). Thus, we find that there does exist a clear probability that both the Haitian government and Mr. Lorisme's enemies would have the ability to learn of the respondent's return.

Furthermore, we conclude that it is also more likely than not that his stepfather's enemies would seek to torture the respondent. According to the record, Mr. Lorisme was targeted during his last trip to Haiti, despite the fact that he had fled the country almost 10 years prior. *See* I.J. at 4-5; *see also* Tr. at 52-53. The passage of time has apparently done nothing to quell the desire of those groups to punish Mr. Lorisme and those that they associate with him, such as his family members. *See* I.J. at 5; *see also* Tr. at 50-51, 52-55, 59-60 (describing the tremendous abuses suffered by Mr. Lorisme's friends and family as a result of their connection to him). In addition, we find that the past harm suffered by the respondent's family certainly increases the likelihood that he will be targeted in the future. We consider this evidence against the backdrop of conditions within Haiti, which discuss the continued existence of politically motivated violence throughout the country. *See, e.g.*, Exh. 3, tab 6 at 1-2, 4-5 (reporting the arbitrary kidnapping, torture, and killing of individuals by various armed groups, including: members of the disbanded armed forces, partisans of Aristide's political party, and by street gangs who are

suspected of being paid and armed by supporters of former President Aristide). As such, we find that it is indeed probable that Mr. Lorisme's foes would target the respondent. Therefore, we must turn to the question of whether the Haitian government would acquiesce in the respondent's torture.

The regulations define "acquiescence of a public official" as requiring that such an individual, "prior to the activity constituting torture, have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7) (emphasis added). Concomitantly, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") in whose jurisdiction the present matter arises, has determined that the term "awareness" includes both actual knowledge *and willful blindness*. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 239-41 (4th Cir. 2004) (citing with approval both *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), and *Ontunez-Tursios v. Ashcroft*, 303 F. 3d 341, 354 (5th Cir. 2002)).[4] *Cf.*

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[4] In *Lopez-Soto*, the Fourth Circuit denied relief to an alien who feared torture in Guatemala by the Mara 18 gang, a group acknowledged to be operating independently of the government. While the court did ultimately deny the alien relief, the holding was not premised on the fact that Mara 18 was acting independently of the Guatemalan government. The court simply concluded that the alien failed to establish that any

Matter of S-V-, 22 I&N Dec. 1306, 1312 (BIA 2002); *Matter of Y-L-*, *supra*, at 283 (defining acquiescence as necessitating "willful acceptance" of the torturous activity). This is not to say that it is sufficient for the respondent to show only that Haitian officials are aware of the activity constituting torture but are powerless to stop it. *See Matter of S-V-*, *supra*. However, if an alien is able to establish that public officials would remain blind to his risk of torture, he will be entitled to protection under the Convention Against Torture.

In this case we find that upon considering the record in its totality there is insufficient evidence for us to conclude that it is more likely than not that the Haitian government would acquiesce in the respondent's torture. Haiti's past is rife with political violence and while the record does indicate the continued existence of governmental corruption and other abuses, these problems do not show that the Haitian government would likely remain willfully blind to the respondent's risk of torture and therefore breach any legal responsibility that it may have to prevent it. *See* Exh. 3, tab 1 and tab 6 at 1-10. *See generally Matter of Y-L-*, *supra*. Based upon the record before us, it seems just as likely that the respondent's family would be able to manipulate the

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torture he may suffer upon his return would be with the government's acquiescence. *See Lopez-Soto v. Ashcroft*, *supra*.

system in order to either expedite his release from prison or insure that he is not tortured. *See generally Matter of J-F-F-*, *supra* (holding that an alien may not establish his eligibility for deferral of removal by stringing together a series of suppositions). Consequently, we find that the Immigration Judge erred in finding that the respondent established his eligibility for deferral of removal under the Convention Against Torture.

In view of the foregoing, the following orders will be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The Department of Homeland Security's appeal is sustained.

FURTHER ORDER: The respondent is ordered removed from the United States to Jamaica.

/s/ Roger Pauley
FOR THE BOARD

Board Member Filppu respectfully concurs in the result and agrees with the majority's analysis, except as to the following. The continued presence of Mr. Lorisme's sister in Haiti substantially undercuts the claim that the stepfather's enemies would seek to torture the respondent today because of his

relationship to his stepfather. Further, the respondent has failed to show the scope of a duty to protect him, under Haitian law, *see De Shaney v. Winnebago Country Dept. of Soc. Serv.*, 489 U.S. 189 (1989), such that we may assess the character of any alleged breach of that duty.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Arlington, Virginia

File No.: A 25 448 372 April 10, 2006

In the Matter of	)	
	)	
MACKENTOCH SAINTHA	)	IN REMOVAL
	)	PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 237(a)(2)(A)(iii) IN Act, as amended, convicted of aggravated felony under Section 101(a)(43)(G) – theft or burglary offense.

APPLICATIONS: Waiver under Section 209(c), deferral of removal under Convention against Torture ("CAT").

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
John R. Ingrassia, Esquire Proskauer Rose, LLP 1001 Pennsylvania Ave., N.W. Suite 400 South Washington, DC 20004	Mona Yousef Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

I. INTRODUCTION

The respondent is a 25-year-old single male who is a native and citizen of Haiti. He concedes removability. I, therefore, find removability established by clear and convincing evidence.

The respondent has been a refugee in the United States since May 11, 1994. I rule him ineligible for a 209(c) waiver under the rationale of Matter of Smirko, 23 I&N Dec. 836 (BIA 2005). Because of the nature and timing of his criminal offenses, the respondent is eligible to apply solely for deferral of removal under Article 3 of the CAT and the implementing regulations. I will grant his CAT deferral application.

II. ISSUES

The issues are credibility, probability of torture, and government acquiescence in torture.

III. LEGAL STANDARDS

The respondent has the burden of proof on his CAT application. In this respect, the respondent's credibility is very important and may be determinative. Generally, respondent's testimony must be detailed, plausible, and consistent. Any material discrepancies or omissions should be explained satisfactorily by the respondent.

To be eligible for relief under Article 3 of the CAT, the respondent must show that it is more likely than not that he will be subject to torture in Haiti by, or at the instigation of, or with the acquiescence of a public official or one acting in an official capacity. Unlike asylum, which requires a showing of nexus, the respondent need not establish that the torture is on account of any particular ground.

Torture is an extreme form of cruel, inhuman, or degrading treatment or punishment and does not include all such treatment. In particular, atrocious or grossly substandard prison conditions usually are not considered torture. Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

In this circuit, "acquiescence" as used in 8 C.F.R. 208.18 does not require "knowing

acquiescence" in or "willful acceptance" of torture. See Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004). Rather, acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. Section 208.18(a)(7).

To qualify for relief under the CAT, the respondent must prove that the torture inflicted would be carried out with the awareness of government officials. That awareness includes both actual knowledge and willful blindness. See Lopez-Soto, supra. Merely showing that in the abstract government officials know of torturous activities and are generally unable to stop them does not show that the government officials are willfully blind to the torture of their citizens by third parties.

In Matter of Y-L-, A-G-, R-S-R-, 23 I&N 207 (AG 2002), the Attorney General rejected for a lack of government acquiescence CAT claims by respondents from Haiti and the Dominican Republic who feared retaliation from drug interests because of those respondents' cooperation with U.S. authorities. The Attorney General characterized the risk of violence as a "occupational hazard" of the illegal drug trade. The Attorney General found that the respondents had failed to show that any torture would be inflicted upon them with the consent or approval of

authoritative government officials acting in an official capacity. The Attorney General found that personal vengeance inflicted by lower level government agents would not fall within the CAT definition. In Matter of G-A-, 23 I&N Dec. 366 (BIA 2002), the BIA found that a combination of the factors presented made it probable that an ethnic Armenian Christian would be arrested for drug offenses imprisoned and tortured in Iran. In Matter of M-B-A-, 23 I&N Dec. 474 (BIA 2002), the BIA found that a Nigerian woman claiming that she would be imprisoned and tortured upon return because of her drug offense was basing her claim on a chain of assumptions and fear of what might happen rather than on proof that government sponsored torture was probable.

IV. SUMMARY OF CLAIM AND EVIDENCE

The respondent bases his claim on fear of torture because his stepfather, Edy Lorisme, was a prominent politician in Haiti. The respondent also fears that he would be imprisoned and tortured as a criminal detainee upon return to Haiti. The respondent's stepfather was a vice president for information of the OPB, a political group opposed to the government of General Cedras and in favor of former President Aristide. As noted earlier, Mr. Lorisme and his family were granted refugee status by the United States in 1994. The respondent was

approximately 13 years old when he arrived in the United States with his family.

The respondent's stepfather returned to Haiti most recently in 2003. Upon his arrival, the respondent's stepfather's close friends warned him that he was in danger because of his past political activities with the OPB. The respondent's stepfather was forced into hiding to avoid harm from former political opponents in Haiti.

Unfortunately, those political opponents killed the respondent's 82-year-old maternal grandmother in Haiti by burning her alive apparently because they could not capture the respondent's stepfather. Within ten days of his arrival, the respondent's stepfather was forced to flee Haiti and return to the United States.

At approximately the same time, a cousin of the respondent's was also killed. The family believes that she was killed by the same political opponents who would have harmed the respondent's stepfather. Since 2003, no member of the respondent's family in the United States has returned to Haiti because they fear for their lives. The respondent and his family are convinced that those in Haiti responsible for the deaths of his grandmother and cousin and who sought to harm his stepfather will remember the respondent if he is returned because of his

association with his stepfather. The respondent's stepfather is the only father he has ever known.

The respondent presented himself and his stepfather, Edy Lorisme, as witnesses.

The respondent submitted some documentation in support of his application. That documentation is adequately indexed in the record and will not be repeated here.

The record contains the latest State Department Country Report on Haiti dated March 8, 2006.

According to that report, the current Haitian government is extremely corrupt and there is widespread public corruption in all branches of government. Members of the Haitian National Police ("HNP") committed killings, disappearances and other human right violations.

There were credible reports of killings by some members of the disbanded armed forces who helped force President Aristide's resignation. There were credible reports of disappearances stemming from internal political conflict. There were widespread kidnappings by armed criminal elements from all social strata throughout the year where victims were tortured and killed while in their kidnappers custody. There were surges of political violence in September, 2004 and again in late 2005.

Although the law prohibits torture, members of the security forces continued to violate these prohibitions. Police officers use excessive and sometimes deadly force in making arrests or controlling demonstrations and were rarely punished for such acts. Prison conditions worsened during the year. In 2004, many police stations and prisons around the country were damaged or destroyed and by year's end only 17 of 21 prisons were rehabilitated and rendered functional. An already burdened prison system was stressed further with insufficient facilities to hold prisoners, especially as new arrests mounted during the year. Conditions in these facilities deteriorated due to a lack of available space. Minors and adults often were held in the same cell.

V. FINDINGS AND ANALYSIS

A. Credibility

I find the respondent and his father credible although their testimony was at times hard to follow.

B. Probability of Torture

According to the Country Report, torture exists in Haiti by both government forces and forces the government fails to control. On the basis of the respondent's connection to his politically prominent stepfather, the torture and death of his maternal grandmother in 2003, and threats against his stepfather in Haiti in 2003, I find a probability that

the respondent would be tortured upon return to Haiti by his stepfather's political opponents or individuals associated with such political opponents.

The respondent is in a significantly more vulnerable position than the "generic criminal deportee" at issue in Matter of J-E-, supra. The respondent's situation is closer to that combination of circumstances that proved successful for the respondent in Matter of G-Y-R-, supra.

C. Government Acquiescence

As a criminal deportee, the government of Haiti would be well-aware of the respondent's return and most likely of his potential vulnerability as the child of a Haitian refugee residing in the United States. The Department of State Country Report shows that the current Haitian government is incredibly corrupt and makes virtually no effort to protect the human rights of its citizens regardless of political background. In particular, as demonstrated in Matter of J-E-, supra, the Haitian government makes little or no effort to protect the rights of criminal deportees returned from the United States.

Under these circumstances, I find that the government of Haiti would be aware of the potential torture of the respondent and would be "willfully blind" to its occurrence. Therefore, I find it probable that the government of Haiti will breach its legal responsibility to prevent the respondent's torture.

Consequently, I find the definition of "government acquiescence" set forth in 8 C.F.R. Section 208.18(a)(7) and INS v. Lopez-Soto, supra, has been satisfied. In Lopez-Soto, the Court found that the respondent had failed to make the government of Guatemala aware of the potential torture. In the present case by contrast, the government of Haiti would be well-aware of the specific potential for torture in the respondent's case.

For the foregoing reasons, I find that the respondent's torture with the acquiescence of the government of Haiti is probable. I, therefore, grant his application for deferral of removal under the CAT.

VI. CONCLUSION

I find the respondent removable as charged. I find him ineligible for a Section 209(c) refugee waiver. I find him and his stepfather credible. On the basis of the credible testimony and other evidence, I find that the respondent has shown that it is probable he will be tortured in Haiti under the standards established by the regulations and the decisions of this circuit. I, therefore, grant his application for deferral of removal under Article 3 of the CAT.

ORDER

The respondent's application for waiver under Section 209(c) of the Act is pretermitted.

IT IS FURTHER ORDERED the respondent's application for deferral of removal to Haiti under Article 3 of the CAT is granted.

IT IS FURTHER ORDERED that in accordance with 8 C.F.R. Section 208.17(a) the respondent is hereby notified that deferral of removal: (1) does not confer any lawful permanent Immigration status in the United States; (2) will not necessarily result in the respondent's release from DHS custody if the respondent is subject to DHS custody; (3) is effective only until terminated; (4) is subject to review and termination if an Immigration Judge determines that it is not likely that the respondent would be tortured in the country to which removable has been deferred or if the respondent requests that deferral be terminated; and, (5) applies only to the country in which it has been determined that the respondent is likely to be tortured and that the respondent may be removed at any time to another country where he or she is not likely to be tortured.

/s/ Paul Wickham Schmidt
PAUL WICKHAM SCHMIDT
United States Immigration Judge

Constitutional, Statutory and Regulatory Provisions Involved

Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * * *

8 U.S.C. 1252(a)(2)(C)

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * * *

8 U.S.C. 1252(a)(2)(D)

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

8 C.F.R. § 208.18(a)(1)

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

* * * *

8 C.F.R. § 208.18(a)(7)

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

FILED: April 14, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2304
(A25-448-372)

MACKENTOCH SAINTHA

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General of United States

Respondents

O R D E R

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

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Supreme Court, U.S.
FILED
OCT 20 2008
OFFICE OF THE CLERK

No. 08-71

In the Supreme Court of the United States

MACKENTOCH SAINTHA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' ruling that petitioner failed to establish that, if he were returned to Haiti, the Haitian government would acquiesce in the commission of acts against him that constitute torture.

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In the Supreme Court of the United States

No. 08-71

MACKENTOCH SAINTHA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 516 F.3d 243. The decisions of the Board of Immigration Appeals (Pet. App. 26a-39a) and the immigration judge (Pet. App. 40a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2008. A petition for rehearing was denied on April 14, 2008 (Pet. App. 54a). The petition for a writ of certiorari was filed on July 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. A person who is present in the United States and fears torture if removed to a certain country may obtain protection under the United Nations Convention

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. The CAT has been implemented through regulations of the Department of Justice. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. 1231 note); see also 8 C.F.R. 1208.16-1208.18.

To obtain protection under the CAT, an alien must demonstrate that it is more likely than not that he would be tortured in the country of removal. 8 C.F.R. 1208.16(c)(3). Torture "is an extreme form of cruel and inhuman treatment" that "does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. 1208.18(a)(1), (2). Conduct constitutes torture only if it is "specifically intended to inflict severe physical or mental pain or suffering." 8 C.F.R. 1208.18(a)(5). Pain and suffering "inherent in or incidental to lawful sanctions" or resulting from law enforcement authorized by law are not torture. 8 C.F.R. 1208.18(a)(3).

Importantly, to qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1). "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. 1208.18(a)(7); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 234 (4th Cir. 2004).

Two forms of protection are available under the CAT: withholding of removal and deferral of removal. An alien who has committed an aggravated felony and has been sentenced to at least five years of imprisonment is ineligible for withholding of removal under the CAT. See 8 U.S.C. 1231(b)(3)(B); 8 C.F.R. 1208.16(c)(4) and (d)(2). Such a person may nevertheless obtain deferral of removal to a particular country if the government determines that he is more likely than not to be tortured by the government or with government acquiescence in that country. 8 C.F.R. 1208.16(c)(4) and 1208.17(a).

b. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section * * * 1227(a)(2)(A)(iii)," *i.e.*, an aggravated felony. 8 U.S.C. 1252(a)(2)(C). In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this Chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioner is a native and citizen of Haiti who was admitted to the United States as a refugee in 1994 and became a lawful permanent resident in 1995. Pet. App.

4a. In 2001, after having been convicted multiple times of larceny, petitioner was convicted of robbery and sentenced to fifteen years of imprisonment. *Id.* at 4a, 30a. When he was released from prison after serving five years of his sentence, United States Immigration and Customs Enforcement charged him with being removable from the United States because his robbery offense is an aggravated felony. *Id.* at 4a; see 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

Petitioner conceded that he is removable because he was convicted of an aggravated felony, but he sought deferral of removal under the CAT. Pet. App. 41a. He claimed he would be tortured if returned to Haiti because his stepfather had been involved in the political party Organisation Populaire de Bon-Repos (OPB), a party formed to oppose Jean-Claude Duvalier, the ruler of Haiti from 1971 to 1986, and his supporters, including General Raoul Cedras, who was the leader of the Haitian government when OPB was founded. *Id.* at 5a.[1]

Petitioner's stepfather had testified that his sister had been beaten and killed because of her affiliation with OPB in 1988. Pet. App. 5a. He also testified that, when he returned to Haiti in 2003, he was forced into hiding due to threats from political opponents, who killed petitioner's maternal grandmother because they could not find him. *Id.* at 45a. And he and petitioner

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[1] Petitioner also sought a waiver of inadmissibility under 8 U.S.C. 1159(c) in order to again adjust his status to that of a lawful permanent resident under 8 U.S.C. 1159(a). Pet. App. 40a-41a. The immigration judge (*id.* at 41a), Board of Immigration Appeals (*id.* at 31a-32a), and court of appeals (*id.* at 18a-25a) all rejected that argument, and petitioner does not renew it before this Court.

testified that one of petitioner's cousins had been killed around the same time, and they believed she was killed by opponents of the OPB. *Ibid.*

An immigration judge (IJ) determined that petitioner was removable as charged but granted his application for deferral of removal under the CAT. Pet. App. 40a-50a. The IJ found the testimony of petitioner and his stepfather credible, *id.* at 47a, and concluded that there was "a probability that [petitioner] would be tortured upon return to Haiti by his stepfather's political opponents," *id.* at 47a-48a.

The IJ then determined that torture would likely occur with government acquiescence because "the government of Haiti would be aware of the potential torture of [petitioner] and would be 'willfully blind' to its occurrence." Pet. App. 48a-49a. The IJ explained that the "the government of Haiti would be well-aware of [petitioner's] return" because he is a criminal deportee, and "the Haitian government makes little or no effort to protect the rights of criminal deportees." *Id.* at 48a.

3. The Board of Immigration Appeals (BIA) reversed the IJ's determination that petitioner was entitled to deferral of removal under the CAT. Pet. App. 28a-39a. The BIA observed that, to obtain CAT deferral, an alien must show that it is more likely than not that he would be tortured "by a public official, or at the instigation or with the acquiescence of such an individual." *Id.* at 32a (citing 8 C.F.R. 1206.16(c) and 1208.18(a)). The BIA noted that "it is not enough for an alien to string together a chain of speculative events"; rather, the alien "must show that it is more likely than not that each event will take place upon his removal." *Ibid.* Reviewing all of the evidence in the record, the BIA agreed with the IJ that it is more likely than not

"that his stepfather's enemies would seek to torture [petitioner]" if he were returned to Haiti. *Id.* at 32a, 35a.

The BIA disagreed with the IJ, however, that petitioner had established that the Haitian government would acquiescence in that torture. Pet. App. 36a-38a. Petitioner argued that either he would be tortured in a Haitian prison because he is a criminal deportee or that he would be released from prison and his stepfather's enemies would torture him. Pet. BIA Br. 10-15. The BIA "consider[ed] the record in its totality" and concluded that "there is insufficient evidence * * * to conclude that it is more likely than not that the Haitian government would acquiesce in [petitioner's] torture." Pet. App. 37a. The BIA explained that although "Haiti's past is rife with political violence" and "governmental corruption" continues to exist, "these problems do not show that the Haitian government would likely remain willfully blind to [petitioner's] risk of torture." *Ibid.* The BIA stated that, "on the record before [it]," it is "just as likely that [petitioner's] family would be able to manipulate the system in order to either expedite his release from prison or insure that he is not tortured." *Id.* at 37a-38a.

One Board member concurred, noting that "[t]he continued presence of [petitioner's stepfather's] sister in Haiti substantially undercuts the claim that the stepfather's enemies would seek to torture [petitioner] today." Pet. App. 38a-39a.

4. The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 1a-25a. The court observed that it generally "do[es] not have jurisdiction to review final orders of removal against aliens charged with removability by reason of having committed aggravated felonies" under 8 U.S.C. 1252(a)(2)(C).

Pet. App. 10a. Because petitioner conceded that he is removable because he committed an aggravated felony, the court explained, it lacked jurisdiction to review his claim unless the claim raised a "constitutional claim[] or question[] of law." *Ibid.* (quoting 8 U.S.C. 1252(a)(2)(D)).

The court considered the nature of petitioner's particular claim and determined that it did not raise a "constitutional claim[] or question[] of law." Pet. App. 10a-17a. The court noted that petitioner's argument on appeal was that "the BIA erred in finding insufficient evidence to conclude that the Haitian government would likely acquiesce in his torture." *Id.* at 9a. The court determined that that contention did not raise a "question[] of law," reasoning that, because in the absence of the statutory bar in Section 1252(a)(2)(C) such a claim normally would be reviewed under the "substantial evidence" standard, it is "necessarily factual in nature." *Id.* at 14a-15a. In the court's view, Congress did not intend the courts of appeals to review an alien's fact-specific disagreement with the BIA. *Id.* at 13a-14a, 16a. Petitioner's invitation to "reweigh the evidence," the court concluded, is "precisely the type of factual re-hashing [the court] must not do." *Id.* at 17a.

In any event, the court concluded that even if it had jurisdiction to review petitioner's claim, that claim "would likely fail because there exists substantial evidence to support the BIA's determination." Pet. App. 17a n.7. The court explained that petitioner "failed to make the requisite showing that the Haitian government was aware of, let alone willfully blind to, the violence suffered by his family members and his stepfather's political allies." *Ibid.*

5. The court of appeals denied petitioner's petition for rehearing or rehearing en banc, with no judge calling for a vote on the petition. Pet. App. 54a.

ARGUMENT

Petitioner contends (Pet. 29-37) that the court of appeals erred in concluding that it lacked jurisdiction to review his fact-bound claim that he had not shown that the government of Haiti would acquiesce in his torture. In petitioner's view (Pet. 30), any challenge to "the application of law to fact" raises a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Petitioner is mistaken. Further, contrary to petitioner's contention (Pet. 16-29), the decision below does not conflict with any decision of this Court or any other court of appeals. In any event, review is not warranted because petitioner would not prevail on his CAT claim even if the federal courts had jurisdiction to review it. This Court has recently denied review on a similar fact-bound question in *Rangolan* v. *Mukasey*, 128 S. Ct. 2934 (2008) (No. 07-1169), and the same result should obtain here.

1. The court of appeals correctly determined that it lacked jurisdiction to consider petitioner's claim. As the court explained, under 8 U.S.C. 1252(a)(2)(C), a court lacks jurisdiction to review an order of removal of an alien who is removable by reason of having been convicted of certain criminal offenses, including aggravated felony offenses. Pet. App. 10a; see, *e.g.*, *Mbea* v. *Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007). Petitioner has conceded that he is removable because he committed an aggravated felony. Pet. App. 30a, 40a-41a. Section 1252(a)(2)(C) thus generally bars federal-court review of petitioner's removal order.

The exception for "questions of law" contained in 8 U.S.C. 1252(a)(2)(D) does not apply here. The BIA's decision to deny CAT protection because petitioner failed to adduce sufficient evidence to meet his burden is a fact-based determination that does not turn on a "question[] of law." See Pet. App. 9a, 11a-12a, 16a. In reversing the IJ's finding that petitioner would be tortured with government acquiescence if returned to Haiti, the BIA "consider[ed] the record in its totality" and concluded as a factual matter that "there is insufficient evidence * * * to conclude that it is more likely than not that the Haitian government would acquiesce in [petitioner's] torture." *Id.* at 37a.

The BIA explained that the evidence petitioner provided was insufficient to meet his burden under a well-settled, uncontested legal standard. Pet. App. 37a-38a. And the BIA repeatedly noted that the reason petitioner's claim failed was that he failed to present key evidence in support of his claim. See, *e.g.*, *id.* at 32a ("it is not enough for an alien to string together a chain of speculative events"); *id.* at 37a ("there is insufficient evidence" to support petitioner's claim); *ibid.* (claim fails on "the record before us"). Petitioner seeks to have a federal court give more weight to his evidence than the agency did, and that type of claim falls outside the INA's limited exception for legal and constitutional questions. *E.g.*, *Torres de la Cruz* v. *Maurer*, 483 F.3d 1013, 1019 n.5 (10th Cir. 2007); see Pet. App. 17a ("reweigh[ing] the evidence" is "precisely the type of factual re-hashing [the court] must not do" under the REAL ID Act).

The REAL ID Act and its legislative history make clear that Congress intended to preclude review of both agency findings of historical facts and agency determinations that result from the agency's weighing and eval-

uation of the evidence in determining whether the alien has met his evidentiary burden. See, *e.g.*, H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) ("When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements."); *id.* at 175-176 ("Factual questions include those questions that courts would review under the 'substantial evidence' * * * standard."). As the court of appeals has observed, courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive." *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.), cert. denied, 548 U.S. 906 (2006) (cited at Pet. App. 17a). The court of appeals therefore correctly concluded that it lacked jurisdiction over petitioner's claim.[2]

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[2] Petitioner lists (Pet. i), as a question presented, whether "Congress may repeal judicial review by any means over a claim involving the application of law to fact," consistent with the Suspension Clause, U.S. Const. Art. I, § 9. Petitioner never raised that contention in the court of appeals. He addressed the jurisdictional issue only in his reply brief, and the discussion in that brief contained no mention of any constitutional claim. Pet. C.A. Reply Br. 3-12. Because petitioner's claim was not pressed or passed on below, it should not be considered by this Court. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

In any event, petitioner's claim lacks merit, because this Court did not hold in either *INS* v. *St. Cyr*, 533 U.S. 289 (2001), or *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), that the Constitution requires judicial review of an alien's claim if it involves the application of law to fact. *Boumediene* addressed judicial review under a materially different statutory regime in the unique context of the wartime detention of enemy combatants, *id.* at 2272-2273, not judicial review of removal orders under 8 U.S.C. 1252. Although the *St. Cyr* Court suggested that "detentions based on errors of law, including the erroneous application or

Petitioner contends (Pet. 29-30) that any challenge by an alien to any application of law to undisputed facts raises a "question[] of law." Whatever the merits of that contention, it is not presented here, as the court of appeals concluded. Pet. App. 12a n.4; p. 13, *infra*. The question whether petitioner has established as a matter of fact that it is more likely than not that he would be tortured with the acquiescence of the Haitian government is not undisputed. The BIA concluded that petitioner had not adduced sufficient evidence to support such a finding, and petitioner disputed that determination on judicial review.

2. Petitioner contends (Pet. 13-16) that the courts of appeals disagree on whether an argument that the BIA erred in weighing the evidence regarding government acquiescence raises a question of law under 8 U.S.C. 1252(a)(2)(D). Petitioner is mistaken. Like the court below, several courts of appeals have concluded that an alien's challenge to the agency's determination that he has not set forth sufficient facts to demonstrate CAT eligibility does not raise a "question[] of law." See, *e.g.*, *Hanan* v. *Gonzales*, 449 F.3d 834, 837 (8th Cir. 2006) (no judicial review of claim that alien was improperly denied CAT relief because "[t]hese are challenges to factual determinations"); *Boakai* v. *Gonzales*, 447 F.3d 1, 5 (1st Cir. 2006) (no judicial review of claim "that the BIA was wrong in rejecting the CAT claim"); *Hamid* v. *Gonzales*, 417 F.3d 642, 647-648 (7th Cir. 2005) (no judicial review of question whether the agency "correctly considered, interpreted, and weighed the evidence presented" in de-

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interpretation of statutes," were historically cognizable on habeas, 533 U.S. at 302, the Court did not clarify what it meant by the term "application," and that language played no part the Court's analysis, which focused on "pure questions of law," *id.* at 305.

termining the likelihood of torture, which is an unreviewable "factual" question). Just as in those cases, petitioner's claim here that he likely would be tortured in Haiti with government acquiescence is a fact-bound determination, not a question of law.

Although petitioner cites (Pet. 22-23) several cases in which courts of appeals have found "questions of law" in the context of CAT determinations, none of those courts considered a claim like petitioner's, *i.e.*, that the agency merely erred in its assessment of the evidence regarding government acquiescence. In *Toussaint* v. *Attorney General of the United States*, 455 F.3d 409, 412 n.3, 415-416 (3d Cir. 2006); *Jean-Pierre* v. *United States Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007); and *Pierre* v. *Gonzales*, 502 F.3d 109, 113-114 (2d Cir. 2007), the courts of appeals concluded that the question whether a particular course of conduct amounts to "torture" under the CAT is a reviewable legal question. This case does not involve a dispute about the legal definition of "torture." Petitioner also cites (Pet. 23) *Arteaga* v. *Mukasey*, 511 F.3d 940 (9th Cir. 2007), but that case did not address the scope of the phrase "question[] of law" in 8 U.S.C. 1252(a)(2)(D). Indeed, the court did not even mention Section 1252(a)(2)(D), because it relied on previous precedent to hold that 8 U.S.C. 1252(a)(2)(C) does not bar review of an aggravated felon's CAT claim when the IJ denies CAT relief on the merits. *Id.* at 942 n.1.

The pre-REAL ID Act cases petitioner cites (Pet. 6, 13)—*Singh* v. *Ashcroft*, 351 F.3d 435 (9th Cir. 2003); *Wang* v. *Ashcroft*, 320 F.3d 130 (2d Cir. 2003); and *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207 (3d Cir. 2003)—are inapposite because they do not address the scope of judicial review allowed by 8 U.S.C. 1252(a)(2)(D). Petitioner

also cites (Pet. 22-23) two unpublished court of appeals decisions, but those decisions do not establish binding precedent and thus could not give rise to the type of disagreement in the circuits that could warrant this Court's review. See Sup. Ct. R. 10.

Petitioner cites various cases (Pet. 18-21, 24-26) addressing whether *other* types of claims (*i.e.*, claims other than a claim that the BIA erred in its factual finding that the alien had not shown a likelihood of torture with government acquiescence) raise "questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Those cases, however, do not shed light on whether petitioner's claim raises a "question[] of law," because, as numerous courts have recognized, that inquiry depends on the particular type of claim at issue. See, *e.g.*, *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 n.3 (6th Cir. 2006) ("emphasiz[ing] that a particularized inquiry into the nature of a petitioner's claim is necessary to determine whether [the court] ha[s] jurisdiction"). Certiorari is not warranted where, as here, the courts have come to the same conclusion when considering the same types of claims. There is, therefore, no split in the circuits that warrants this Court's review.

Indeed, to the extent that petitioner seeks review on the abstract question whether "questions of law" includes "the application of law to fact" (Pet. 30), it is worth noting—as petitioner concedes (Pet. 14, 20-21)—that the court of appeals expressly refused to weigh in on that issue. Pet. App. 12a n.4 ("We need not resolve" whether "questions of law are limited to questions of statutory interpretation or also include mixed questions of law and fact.").

Petitioner also contends (Pet. 27-28) that review is warranted because the decision below is inconsistent

with two recent decisions of the BIA. That is incorrect. Neither BIA decision considered the scope of the exception for "questions of law" contained in 8 U.S.C. 1252(a)(2)(D). That statutory provision governs judicial review of BIA decisions, and thus does not apply in the BIA proceedings themselves. Instead, the BIA decisions addressed the scope of the BIA's review of IJ decisions under 8 C.F.R. 1003.1(d)(3). That regulation directs the BIA to review "[f]acts determined by the immigration judge, including findings as to the credibility of testimony," under the "clearly erroneous" standard. 8 C.F.R. 1003.1(d)(3)(i). The regulation also states that the BIA shall review "questions of law, discretion, and judgment and all other issues * * * *de novo*." 8 C.F.R. 1003.1(d)(3)(ii).

In *In re V-K-*, 24 I. & N. Dec. 500 (2008), the BIA held that the question whether an alien had established a likelihood of torture was to be reviewed *de novo*, because it was not the type of credibility determination or finding of historical fact that was entrusted by the regulation to the IJ and reviewed only for clear error. *Id.* at 501. The court did not hold that such a question is a "question[] of law"; rather, it characterized such a question as a question of "judgment." *Ibid.* The BIA applied the same principle in *In re A-S-B-*, 24 I. & N. Dec. 493 (2008), and held that an IJ's determination that an alien established a well-founded fear of persecution was not the sort of finding of fact reviewable only for clear error within the meaning of the regulation. *Id.* at 497-498. Again, the BIA was construing only the scope of the Attorney General's own regulation, and it simply distinguished historical facts and credibility determinations from "all other issues" (8 C.F.R. 1003.1(d)(3)(ii)), which the regulation directs the BIA to review *de novo*.

24 I. & N. Dec. 497-498. These two decisions, therefore, do not establish any conflict in authority with the decision below.[3]

3. Even if the court of appeals erred in finding that it lacked jurisdiction to review petitioner's claim, further review would not be warranted because petitioner would not succeed on his challenge to the agency's denial of CAT deferral. As the BIA correctly found, petitioner's evidence of Haiti's violent political past and the continued existence of government corruption is insufficient to meet his burden of showing that the Haitian government would acquiesce in his torture. Pet. App. 37a. In the BIA's view, the record evidence reveals that "it seems just as likely that [petitioner's] family would be able to manipulate the system" to protect him from torture, particularly because petitioner's stepfather's sister still lives in Haiti. *Id.* at 37a-38a.

If the court of appeals had jurisdiction to review petitioner's claim, it would do so under the deferential "sub-

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[3] Petitioner argues (Pet. 28) that the court of appeals' decision "created an untenable whipsawing effect" on him because the BIA upheld the IJ's finding that the testimony presented was credible, yet concluded that he had failed to meet his burden of establishing that he would be tortured with government acquiescence. That is incorrect. The BIA simply concluded that, although the evidence petitioner presented was credible, he did not provide enough evidence to meet his burden. Pet. App. 32a ("it is not enough for an alien to string together a chain of speculative events"); *id.* at 37a ("there is insufficient evidence * * * to conclude that it is more likely than not that the Haitian government would acquiesce in [petitioner's] torture). Moreover, it is not anomalous that the BIA reviewed petitioner's claim *de novo*, while the court of appeals lacked jurisdiction to review it, because 8 C.F.R. 1003.1(d)(3) was intended to authorize broad agency review, *e.g.*, *A-S-B-*, 24 I. & N. Dec. at 496, while the REAL ID Act was intended to authorize only a narrow form of judicial review, see pp. 9-10, *supra*.

stantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), under which the agency's factual determinations are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). The court of appeals has already concluded that petitioner likely cannot prevail under that standard. The court stated that petitioner's claim "would likely fail because there exists substantial evidence to support the BIA's determination," concluding that petitioner "failed to make the requisite showing that the Haitian government was aware of, let alone willfully blind to, the violence suffered by his family members and his stepfather's political allies." Pet. App. 17a n.7. In light of the deficiencies in petitioner's evidence noted by both the BIA and the court of appeals, the record plainly does not compel a finding that it is more likely than not that petitioner would be tortured with government acquiescence if returned to Haiti. Further review of the decision below is therefore unwarranted for this additional reason as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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MACKENTOCH SAINTHA,

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MICHAEL B. MUKASEY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

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Miscellaneous

Brief for the United States,
No. 95-5257, 1996 WL 32774, in
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I. THE FOURTH CIRCUIT ERRED.

1. The critical point in this case is that petitioner does not challenge the underlying historical facts found by the IJ. Rather, petitioner contends that, on these historical facts, he satisfied the legal test for "acquiescence." Petitioner is thus raising a traditional claim involving the application of law to fact: "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

The government nonetheless asserts that the facts *are* in dispute and that petitioner is seeking judicial review of those facts. But, notably, the government does not contend that petitioner is seeking review of the underlying *historical* facts. Rather, the government states: "The question whether petitioner has established as a matter of fact that it is more likely than not that he would be tortured with the acquiescence of the Haitian government is not undisputed." BIO 11.

The government (like the Fourth Circuit) has simply re-labeled the ultimate legal conclusion – whether the Haitian government will acquiesce in petitioner's likely torture – as a factual claim. But that type of re-characterizing would transform every application claim into a factual claim.

Thus, for example, in *Ornelas v. United States*, 517 U.S. 690, 697 (1996), the Court held that

whether probable cause is satisfied on the historical facts of a case is a legal question. Under the government's approach, however, that claim could also be re-labeled simply by stating that the defendant disputes, as a factual matter, whether probable cause was satisfied.

The government also states that the "BIA concluded that petitioner had not adduced sufficient evidence to support such a finding [of acquiescence], and petitioner disputed that determination on judicial review." BIO 11. The government argues, therefore, that petitioner is simply asking the court to "give more weight to his evidence than the agency did . . . ." BIO 9.

But the BIA's reversal of the IJ ruling did not turn on a disagreement over the underlying *historical* facts. The BIA stated explicitly that it found "no clear error in the Immigration Judge's findings of fact." Pet. App. 29a n.1. Significantly, the government does not even address this statement.

The BIA thus held only that there were insufficient historical facts to satisfy the legal standard of acquiescence. As the government itself made clear in its *Ornelas* brief, that is not a factual claim: "courts must decide as a matter of law whether the facts supply the *requisite quantum* of suspicion" to satisfy probable cause. Brief for the United States, No. 95-5257, 1996 WL 32774, at *18.

Moreover, the BIA has specifically held that these types of claims are *not* factual claims. Pet. 27-29 (citing *Matter of V-K-* and *Matter of A-S-B-*). The government argues (at 13-15) that the agency and courts can have different review standards, but that misses the point. The claim in this case cannot be labeled factual if the same claim would be deemed non-factual under BIA precedent.

2. The government also contends that petitioner's claim is unreviewable because it involves a "well-settled, uncontested legal standard." BIO 9. But that is the very definition of an application claim: whether the historical facts satisfy an "undisputed" legal standard. *Pullman-Standard*, 456 U.S. at 289 n.19.

Legal standards will often be settled at only the most general level and will thus "acquire content only through application" to concrete factual settings. *Ornelas*, 517 U.S. at 697. In *Ornelas*, for instance, the legal standard for warrantless searches was well settled ("reasonable suspicion" or "probable cause"). The Court emphasized, however, that it was "not possible" to articulate "precisely" what was meant by those standards, *id.* at 695, and held that "[i]ndependent review" of individual fact patterns was thus necessary "to clarify" the "legal principles." *Id.* at 697.

Here also, the legal standard is settled only at the most general level – the CAT applicant must show governmental "acquiescence." Pet. App. 36a. Yet as this case illustrates, those terms have little

meaning in the abstract, and indeed, resulted in divergent rulings from the IJ and BIA, despite agreement on the historical facts.

The IJ noted that "the government of Haiti would be well-aware of respondent's return and most likely of his potential vulnerability" and that the government "makes virtually no effort to protect the human rights" of those like petitioner. Pet. App. 48a. Critically, moreover, the IJ did not find merely that the Haitian government is powerless to prevent torture or was only *generally* aware of political violence in Haiti. The IJ found that the Haitian government "would be well-aware of the *specific* potential for torture" petitioner will face. *Id.* at 48a-49a (emphasis supplied).

On these historical facts, the IJ properly concluded that petitioner had satisfied the definition of "acquiescence." Pet. App. 49a. The BIA reversed with virtually no explanation, yet it is difficult to see what the general term "acquiescence" could mean if it is not satisfied in a case where (1) the government will be aware of the petitioner's return to the country and the "specific potential for torture" he will likely face from political opponents, (2) the government makes "little or no effort" to protect those like petitioner, and (3) there is no suggestion that the Haitian government cannot prevent the torture if it chooses.[1]

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[1] As noted, the BIA expressly agreed with the IJ that petitioner was more likely than not to be tortured (Pet. App.

Furthermore, although the government repeatedly emphasizes that petitioner's claim is "fact-based" (BIO 9), the claim here is far less fact-specific than many claims this Court treats as legal claims. *See, e.g., Ornelas*, 517 U.S. at 698 (emphasizing that "one determination will seldom be a useful precedent for another" in the probable cause area) (quotation marks and citations omitted). Here, there will frequently be similar factual patterns because the cases concern policies at the governmental level.

In addition, unlike in cases such as *Ornelas*, 517 U.S. 690, and *Thompson v. Keohane*, 516 U.S. 99 (1995), the question here does not simply concern the level of appellate review, but whether there will be *any* judicial review. In the absence of any review, the BIA can continue to routinely (and cryptically) deny CAT claims, simply by asserting that the petitioner's historical facts do not amount to acquiescence.

32a-36a), and disagreed only with the IJ's acquiescence determination. Insofar as the BIA offered any explanation for that disagreement in its acquiescence discussion at the conclusion of its opinion, it stated only that "it seems just as likely that the [petitioner's] family would be able to manipulate the system in order to . . . insure that he is not tortured." Pet. App. 37a-38a. But CAT's drafters could not conceivably have meant that a government does not acquiesce in torture if it can be manipulated to prevent the torture. If anything, the BIA's statement reinforces that the Haitian government is not incapable of preventing torture if it *chooses* to do so.

3. The government argues that *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), does not support petitioner because it was decided under a different statute dealing with enemy combatants. BIO 10 n.2. But, if anything, the enemy combatant context was viewed by the government as more controversial.

The government dismisses *INS v. St. Cyr*, 533 U.S. 289 (2001), as dicta. But while *St. Cyr* ultimately was decided on statutory grounds, the interpretation of the statute was driven largely by Suspension Clause concerns grounded in the Court's historical habeas analysis. 533 U.S. 299-303. The government also argues (at 10-11 n.2) that *St. Cyr* did not "clarify what it meant by the term 'application.'" Even if that were true, it is a reason for *granting* review, especially given the number of courts that have relied heavily on that language. *See, e.g., Ramadan v. Gonzales*, 479 F.3d 646, 652 (9th Cir. 2007) (per curiam); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 327 (2d Cir. 2006).[2]

II. THERE IS A DEEP CIRCUIT SPLIT.

1. The government does not dispute that only three courts of appeals (the Sixth, Seventh and Tenth Circuits) have held that Section 1252(a)(2)(D)

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[2] The government contends (at 10 n.2) that the constitutional right to review was waived below, but petitioner expressly discussed *St. Cyr* and the history of immigration habeas. *See* Pet's. Reply Br. at 5-6. In any event, the constitutional right to review can and must be considered as part of the statutory analysis. *St. Cyr*, 533 U.S at 299-300 (relying on constitutional avoidance canon).

is limited to pure legal claims, while at least six others (the Second, Third, Fourth, Eighth, Ninth and Eleventh) have squarely held that Section 1252(a)(2)(D) covers claims involving the application of law to fact. Pet. 18-19. The government contends, however, that this threshold question is not presented here because the Fourth Circuit refused to "weigh in on that issue" and held only that petitioner's claim was unreviewable because it presented a factual question. BIO 13.

But the Fourth Circuit had previously decided the issue in a published opinion. *See Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (holding that the "application of law to factual findings" is reviewable under Section 1252(a)(2)(D)); Pet. 17 (citing *Jean*). The fact that the Fourth Circuit in this case failed to acknowledge *Jean* (at Pet. App. 12a n.4) is of no consequence, since there is no dispute that *Jean* is the law in that Circuit.

More fundamentally, the Court will first need to construe Section 1252(a)(2)(D) to determine what types of legal claims are reviewable before it can decide whether petitioner's particular claim falls within the statute. The government has offered no reason why this Court would decide whether a claim is factual or legal in a vacuum, without relation to what Congress meant by the term "questions of law."

2. The government also does not dispute that, outside of the CAT context, the courts of appeals have reached different results in determining when a claim is "factual." The government argues, however,

that those cases are irrelevant because the jurisdictional inquiry turns on the "particular type of claim at issue." BIO 13. But Section 1252(a)(2)(D) is a generally-applicable jurisdictional provision. As a result, the analytical disagreements in the courts of appeals cannot be confined to a particular set of claims.

Indeed, the flaw in the government's argument, and the Fourth Circuit's decision, is identical to that in non-CAT cases – the failure to distinguish between historical facts and application claims. *Compare Ramadan* 479 F.3d at 656-57 (relying on *Pullman-Standard* and holding that it could review whether the historical facts were sufficient to satisfy the statutory standard for filing an untimely asylum application), *with Hana v. Gonzales*, 503 F.3d 39, 42-43 (1st Cir. 2007) (concluding that alien's claim that his depression and nervous breakdown amounted to "extraordinary circumstances" excusing his late filing was not a reviewable question of law). *See generally* Pet. 18-27.

3. In the CAT context, the government notably does not dispute that the Second, Third, Ninth and Eleventh Circuits have all held that they may review the "application of law to fact." *See* Pet. 21-23 (discussing CAT cases). The government offers a variety of reasons, however, why the law in these circuits should be ignored.

(a) The government contends (at 12) that *Jean-Pierre v. United States Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007), and *Pierre v.*

Gonzales, 502 F.3d 109, 113-114 (2d Cir. 2007), are distinguishable because they involved a "dispute about the legal definition of 'torture.'" But those cases were conceptually identical to petitioner's case.

In *Jean-Pierre*, as in this case, the legal standard was settled: under the governing regulations, torture is the infliction of "severe" pain and suffering. The historical facts were also settled – Haiti engages in such practices as "kalot marassa" (severe boxing of the ears). The question was thus whether kalot marassa constituted "severe" pain and suffering. The Court reviewed the question, stressing that Section 1252(a)(2)(D) covers "the application of law to fact." 500 F.3d at 1321 (citing *Pullman-Standard*). Similarly, in *Pierre*, the Second Circuit stated that it could not review the BIA's "factual findings" (such as those about the "prevailing conditions" in Haiti), but made clear that it could review the BIA's "application of the definition of torture to its factual findings . . . ." 502 F.3d at 121.[3]

The government notably avoids stating whether it believes *Pierre* and *Jean-Pierre* involved "pure" legal claims or, rather, "application" claims

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[3] The Second Circuit, moreover, has pre-REAL ID CAT precedent. *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003). The government dismisses *Wang* because it predated the enactment of Section 1252(a)(2)(D), BIO 12, but does not contest the overarching point that Section 1252(a)(2)(D) was intended to retain the scope of review previously afforded in habeas. *Chen*, 471 F.3d at 326-27, 330 n.8; *id.* at 331 n.10 (citing *Wang* approvingly).

that nonetheless fell within Section 1252(a)(2)(D). If the former, the government has not explained why the cases are conceptually different from petitioner's case. If the latter, the government has offered no basis for distinguishing between reviewable and unreviewable *application* claims.

(b) The government dismisses (at 13) the Third Circuit's decisions in *Badewa* and *DeAlmeida* because they were unpublished, but does not dispute that they involved the type of claim petitioner raises here. The Third Circuit, however, has issued several published CAT cases explicitly holding that the "application of law to fact" may be reviewed under Section 1252(a)(2)(D). *See, e.g., Kamara v. Attorney General*, 420 F.3d 202, 211 (3d Cir. 2005). Accordingly, the Third Circuit now *routinely* reviews CAT application claims, without the need for additional published decisions, citing where necessary to its lead decision in *Kamara*.[4] In short, there is no question that petitioner would have received judicial review of his claim in the Third Circuit.

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[4] *See, e.g., Leon-Oveido v. Attorney General*, 182 Fed. Appx. 130, 133 (3d Cir. 2006) (citing *Kamara*, and reviewing the BIA's decision that petitioner's evidence was "insufficient to demonstrate that it is more likely than not" that he will be subject to torture); *Hussein v. Attorney General*, 273 Fed. Appx. 147, 154 (3d Cir. 2008) (same); *Neyor v. Attorney General*, 256 Fed. Appx. 473, 477 (3d Cir. 2007) (same); *Momoh v. Attorney General*, 190 Fed. Appx. 159, 163 (3d Cir. 2006) (same); *Gelaneh v. Ashcroft*, 153 Fed. Appx. 881, 885 (3d Cir. 2005) (same). *See also Azuakoemu v. Attorney General*, 195 Fed. Appx. 47, 52 (3d Cir. 2006).

The government also dismisses petitioner's Ninth Circuit cases, but, again, does not dispute that petitioner would have received review of his claim in that Circuit. Rather, the government dismisses the Ninth Circuit's cases on the ground that those cases did not hinge on an interpretation of Section 1252(a)(2)(D), but instead held that the bar on review for criminal aliens (8 U.S.C. 1252(a)(2)(C)) was inapplicable to CAT claims. BIO 12.

The fact that the Ninth Circuit's analysis differs from that adopted by other courts is not a reason to deny review; this Court reviews and reconciles divergent results, not analytical approaches. Indeed, even if this case were not about a generally-applicable jurisdictional provision, and were solely about review of CAT cases, this Court's review would be warranted to address the split given the life and death stakes in CAT cases.[5]

Finally, the government cites cases from the First, Seventh and Eighth Circuits, BIO 11-12 (citing *Hanan*, *Boakai*, and *Hamid*), but those cases are too cryptic to know whether the petitioners were challenging the application of the torture standard to the historical facts. Insofar as the claims are decipherable in *Hanan*, the petitioner clearly

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[5] Given the Ninth Circuit's analysis in *Ramadan*, it is clear in any event that the Ninth Circuit would review CAT claims like petitioner's claim, even if it found that the bar on review did apply to CAT cases. *See also Singh v. Gonzales*, 351 F.3d 435 (9th Cir. 2003).

appears to be challenging historical facts, such as the level of "control" exercised by coalition forces in Afghanistan. 449 F.3d at 834, 836-37.

III. PETITIONER'S MERITS CLAIM IS SUBSTANTIAL.

The Fourth Circuit stated in a footnote (Pet. App. 17a n.7) that petitioner's claim would likely not have succeeded under the "substantial evidence" test. But the whole point of this case is whether petitioner was actually raising a factual claim, and the government has offered no reason why the Fourth Circuit would use the substantial evidence test on remand if the Court concluded that petitioner had raised a reviewable *legal* claim.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE.

First, unlike virtually every other Board case, the BIA stated explicitly in this case (Pet. App. 29a n.1) that it agreed with the IJ's findings of historical fact. Thus, this case squarely presents the question that arises in literally hundreds of circuit cases: whether the petitioner satisfied the statutory standard on the historical facts of the case;[6]

Second, because CAT is mandatory, the separate jurisdictional bar on discretionary claims is

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[6] The government notes (at 8) that the Court denied review in *Rangolan*, but the government's opposition there emphasized that the court of appeals had not issued an opinion in the case and there was no Fourth Circuit CAT precedent at the time. BIO at 9, 14.

inapplicable. Consequently, this case provides a clean vehicle for deciding the scope of Section 1252(a)(2)(D);

Finally, the issue over which petitioner seeks review is determinative of his CAT claim. The IJ and BIA both agreed that petitioner would more likely than not be tortured; indeed, both noted that his stepfather had recently been forced to flee Haiti and that his grandmother was literally burned alive. The only disagreement was whether petitioner's facts satisfied the legal standard for acquiescence – the claim over which petitioner seeks review.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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